

**RECORD OF TRIAL
COVER SHEET**

**IN THE
MILITARY COMMISSION
CASE OF**

UNITED STATES

V.

JABRAN SAID BIN AL QAHTANI

ALSO KNOWN AS:

**SALAM AL FARSI-----HATEB
JABRAN AL QAHTAN-----JABRAN WAZAR
SAAD WAZAR HATIB JABRAN
JABRAN SAAD WAZAR SULAYMAN**

No. 050007

VOLUME ____ OF ____ TOTAL VOLUMES

1ST VOLUME OF REVIEW EXHIBITS

(RE): RES 1-66

APRIL 25, 2006 SESSION

(REDACTED VERSION)

United States v. Jabran Said Bin al Qahtani, No. 050007

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A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. See generally *United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and *United States v. Castleman*, 10 M.J. 750, 751 (AFCMR 1981) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

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NUMBER

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[REDACTED]

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources, including the factual summary from the Department of Defense Criminal Investigation Task Force dated June 17, 2004 and forwarded to me by you by letter dated June 29, 2004;

Pursuant to the Military Order of November 13, 2001 on "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism";

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the Armed Forces of the United States, hereby DETERMINE for the United States of America that in relation to Jabran Said bin al Qahtani, Department of Defense Internment Serial No. [REDACTED] who is not a United States citizen:

- (1) There is reason to believe that he, at the relevant times:
 - (a) is or was a member of the organization known as al Qaida;
 - (b) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - (c) has knowingly harbored one or more individuals described in subparagraphs (a) or (b) above.
- (2) It is in the interest of the United States that he be subject to the Military Order of November 13, 2001.

Accordingly, it is hereby ordered that, effective this day, Jabran Said bin al Qahtani shall be subject to the Military Order of November 13, 2001.

DATE July 6, 2004
White House Office-controlled Document

[REDACTED]

RE 1 (al Qahtani)
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v.

CHARGE:
CONSPIRACY

a/k/a Jabran Wazar

8. In 1992 and 1993, al Qaida supported violent opposition of US. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.
9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.
10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyian Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a/ Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:
 - a. In 1998 Barhoumi, an Algerian citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated

training camp, where he received training in constructing and dismantling electronically-controlled explosives.

- b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.
- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bayat* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.

- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.
- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.
- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
- m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
- n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
- o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
- p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
- q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.

- r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.

15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

V.

November 4, 2005

a/k/a Jabran Wazar

John P. Althaus, Jr.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Military Commission Case No. 05-0007

UNITED STATES)

v.)

JABRAN SAID BIN AL QAHTANI)

a/k/a Salam al Farsi)

a/k/a Hateb)

a/k/a Jabran al Qahtan)

a/k/a Saad Wazar Hatib Jabran)

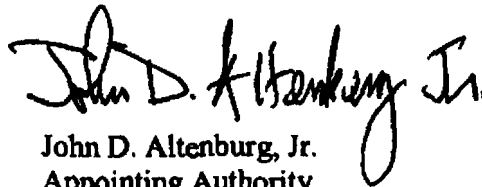
a/k/a Jabran Saad Wazar Sulayman)

a/k/a Jabran Wazar)

Referral

DEC 16 2005

The charges against Jabran Said Bin al Qahtani (a/k/a Salam al Farsi, a/k/a Hateb, a/k/a Jabran al Qahtan, a/k/a Saad Wazar Hatib Jabran, a/k/a Jabran Saad Wazar Sulayman, a/k/a Jabran Wazar) are referred, as a noncapital case, to the Military Commission identified in Appointing Order No. 05-0008. As soon as practicable, the Presiding Officer will conduct those sessions he deems appropriate to ensure the expeditious conduct of the trial.


John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

[REDACTED]

Military Commission Case No. 05-0007

UNITED STATES

v.

JABRAN SAID BIN AL QAHTANI

a/k/a Salam al Farsi

a/k/a Hateb

a/k/a Jabran al Qahtan

a/k/a Saad Wazar Hatib Jabran

a/k/a Jabran Saad Wazar Sulayman

a/k/a Jabran Wazar

) **Military Commission Members**

) **Appointing Order No. 05-0008**

) **DEC 16 2005**

The following officers are appointed to serve as members and alternate members, respectively, of a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member or alternate member will serve until removed by proper authority.

In the event that one or more of the members, not including the Presiding Officer, is removed by the Appointing Authority, one or more of the alternate members will automatically be appointed, in order, to replace the removed member(s), until either all removed members have been replaced or no alternate members remain. Should the Presiding Officer grant a challenge for cause against any member, that member will be removed as a member, excused from further proceedings, and automatically replaced by the next alternate member. Any alternate member appointed under the automatic replacement provisions herein described shall become a member of the commission and shall be subject to removal and automatic replacement as if originally appointed as a member. In accordance with Paragraph 4(A)(1)&(2) of Military Commission Order No. 1, should no alternate member be available to replace any member I remove or any member removed pursuant to a challenge for cause, and provided that at least three members, in addition to the Presiding Officer, remain, the commission may proceed without appointment of additional members.

Captain Daniel E. O'Toole, USN, Presiding Officer

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USA, Member

Colonel [REDACTED] USA, Member

Captain [REDACTED] USN, Member

Lieutenant Commander [REDACTED] USN, First Alternate Member

Lieutenant Colonel [REDACTED] USMC, Second Alternate Member


John D. Altenburg, Jr.

Appointing Authority for Military Commissions

[REDACTED]

RE 5 (al Qahtani)
Page 1 of 1



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

1 December 2005

MEMORANDUM DETAILING DEFENSE COUNSEL

To: Lieutenant Colonel Bryan T. Broyles, JA, USA

Subj: DETAILING LETTER REGARDING MILITARY COMMISSION
PROCEEDINGS OF JABRAN SAID BIN AL QAHTANI

1. Pursuant to the authority granted to me by my appointment as Chief Defense Counsel, Sections 4.C and 5.D of Military Commission Order No. 1, dated August 31, 2005, and Section 3.B(8) of Military Commission Instruction No. 4, dated September 16, 2005, you are hereby detailed as military counsel for all matters relating to military commission proceedings involving Jabran Said Bin al Qahtani. Your appointment exists until such time as any findings and sentence become final as defined in Section 6.H(2) of Military Commission Order No. 1, unless you are excused from representing Mr. al Qahtani by a competent authority.
2. In your representation of Mr. al Qahtani, you are directed to review and comply with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (Nov. 16, 2001), Military Commission Orders Nos. 1 and 3, Military Commission Instructions 1 through 9, and all Supplementary Regulations and Instructions issued in accordance therewith. You are directed to ensure that your conduct and activities are consistent with all applicable prescriptions and proscriptions.
3. You are directed to inform Mr. al Qahtani of his rights before a military commission. In the event that he chooses to exercise his rights to Selected Military Counsel or his right to Civilian Defense Counsel as his own expense, you shall inform me as soon as possible.
4. In the event that you become aware of a conflict of interest arising from the representation of Mr. al Qahtani before a Military Commission, you shall immediately inform me of the nature and facts concerning such conflict. You should be aware that in addition to your State Bar and Service Rules of Professional Conduct, that by virtue of your appointment to the Office of Military Commissions you will be attached to the Defense Legal Services Agency and will be subject to professional supervision by the Department of Defense General Counsel.
5. You are directed to inform me of all requirements for personnel, office space, equipment, and supplies necessary for preparation of the defense of Mr. al Qahtani.

Dwight H. Sullivan
Colonel, United States Marine Corps Reserve

RE 6 (al Qahtani)
Page 1 of 2



cc:
Colonel Morris Davis
Brigadier General Thomas L. Hemingway
Mr. [REDACTED]

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Wednesday, December 21, 2005 11:42 AM
To: [REDACTED]
Subject: US v. al Qahtani: Directions of the Presiding Officer
Attachments: Significant Commission Dates - worksheet v1.doc; Email and attachment - First instructions by PO Chester adopted by POs O'Toole and Kohlmann, 21 Dec 05.pdf; PO 2 - al Qahtani - Discovery Order - 21 Dec 05.pdf

1. This email, and attachments 1 and 2, are being added to the filings inventory as PO 1. (See POM 12-1 for a description of the Filings Inventory.)

2. I am Keith Hodges, the Assistant to the Presiding Officer in the case in the subject line of this email. My duties are outlined in Presiding Officer Memorandum (POM - which serve as rules of court) 2-2. That POM, and all the others POMs, can be found at:
http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html. This email, and all others that I send that state "BY DIRECTION OF THE PRESIDING OFFICER" are sent at the Presiding Officer's direction. The Presiding Officer has directed that all the current POMs, to include as later modified or supplemented, are in effect for this case.

3. Your attention is invited to the enclosed Discovery Order (PO 2) for compliance by the parties.

4. NLT 5 Jan 06 the Presiding Officer wishes to know what is the earliest possible time that you and can attend a session of the Commission, without the other members, at Guantanamo to accomplish the following business ("Reply all" with your answer):

- a. Initial session without members (convening of the Commission.)
- b. Accused's election of counsel.
- c. *Voir dire* of the Presiding Officer (materials to assist you in *voir dire* will be sent at a later time.)
- d. Discussion - and if necessary - litigation concerning the attached discovery order, its terms and enforceability.
- e. Entry of pleas. (If the accused requests to defer pleas, the Presiding Officer advises he will grant the request.)
- f. Motions. (If the parties request to defer motions - except a motion as to the wording, terms, and enforceability of the discovery order - the Presiding Officer advises he will grant the request.)
- g. Setting a schedule for future sessions and the trial to include: law motions (motions other than on the admissibility or form of evidence); evidentiary motions; *voir dire* of the other members, and the trial. The dates the Presiding Officer will be looking at are those on the attached "Significant Dates Worksheet."

RE 7 (al Qahtani)
Page 1 of 11

5. If you request a date in paragraph 4 above later than 13 February 2006, your reply must include the reasons for the delay and a calendar showing your activities and commitments - personal and professional - between 5 Jan 2006 and the date you request a delay that make it impossible to proceed by 13 February 2006.

6. NLT 5 Jan 06, the parties will provide the Presiding Officer, opposing counsel, and me a copy of all protective orders, issued by any authority, that they believe have been issued and remain in effect. Any party requesting a protective order from the Presiding Officer will use the procedures in POM 9-1.

7. Also attached is an email sent at the direction of the Presiding Officer adopting "first instructions" issued earlier by another Presiding Officer, COL Chester. The instructions that were adopted are also attached.

Three attachments:

- 1 - PO 2 - Discovery Order
- 2 - Significant dates worksheet
- 3 - Email on adopted "first instructions" and those instructions

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

[REDACTED]

<<Significant Commission Dates - worksheet v1.doc>> <<Email and attachment - First instructions by PO Chester adopted by POs O'Toole and Kohlmann, 21 Dec 05.pdf>> <<PO 2 - al Qahtani - Discovery Order - 21 Dec 05.pdf>>

UNITED STATES OF AMERICA

v.

JABRAN SAID BIN AL QAHTANI

a/k/a Salam al Farsi

a/k/a Hateb

a/k/a Jabran al Qahtan

a/k/a Saad Wazar Hatib Jabran

a/k/a Jabran Saad Wazar Sulayman

a/k/a Jabran Wazar

DISCOVERY ORDER (PO 2)

December 21, 2005

1. The Presiding Officer finds that to ensure a full and fair trial, the following ORDER is necessary.
2. This Order does not relieve any party of any duty to disclose those matters that Commission Law requires to be disclosed. Where this Order requires disclosure at times earlier or later than Commission Law provides or requires, the Presiding Officer has determined that such earlier or later disclosure is necessary for a full and fair trial.
3. All disclosures required by this Order are continuing in nature. The times set forth below apply to any matter known to exist, or reasonably believed to exist, on the date this Order is issued. If any matter required to be disclosed by this order is not known to exist on the date this Order is issued, but later becomes known, the party with the responsibility to disclose it under this Order will disclose it as soon as practicable, but not later than three duty days from learning that the matter exists. In those cases when any matter required to be disclosed by this Order, becomes known after the date of this Order, but the party is unable to obtain or produce it as required, the party shall give written (email) notice to opposing counsel within three duty days, said notice including a description of the nature of the item or matter and the date and time when it will be produced or disclosed.
4. Any matter that has been provided or disclosed to opposing counsel prior to the entry of this Order need not be provided again if only to comply with this Order.
5. Providing a list of witness names in compliance with this discovery Order does not constitute a witness request. Witness requests must be made in accordance with POM #10-2.
6. Neither the Presiding Officer nor the Assistant shall be provided with a copy of the items ordered to be produced or disclosed by this Order. If counsel believe there has not been adequate compliance with this Order, counsel shall seek relief using the procedures in POM 4-3 or POM 7-1, as appropriate.

7. Objections to the wording of this Order, or the authority to issue this Order. Counsel who object to the requirements of this discovery Order, the Presiding Officer's authority to issue a discovery order, or who seek any relief from the requirements of this Order shall file a motion in accordance with POM 4-3 NLT 31 Jan 2006.

8. Failure to disclose a matter as required by this Order may result in the imposition of those sanctions which the Presiding Officer determines are necessary to enforce this Order or to otherwise ensure a full and fair trial.

9. If any matter that this Order, or Commission Law, requires to be disclosed was in its original state in a language other than English, and the party making the disclosure has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also disclose a copy of the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

10. Each of the disclosure requirements of this Order shall be interpreted as a requirement to provide to opposing counsel a duplicate of the original of any matter to be disclosed. Transmittal of a matter to opposing counsel electronically satisfies the disclosure requirements herein and is the preferred method of production. When disclosure of any matter is impracticable or prohibited because of the nature of the item (a physical object, for example), or because it is protected or classified, the disclosing party shall permit the opposing counsel to inspect the item in lieu of providing it.

11. A party has not complied with this Order until that party has disclosed to detailed counsel for the opposing party - or another counsel lawfully designated by the detailed counsel - the matter required to be disclosed or provided.

12. Definitions:

a. "At trial." As used in this order, the term "at trial" means during the proponent party's case in chief (and not rebuttal or redirect), whether on merits or during sentencing. Matters to be disclosed which relate solely to sentencing will be so identified.

b. "Exculpatory evidence" includes any evidence that tends to negate the guilt of the accused, or mitigates any offense with which the accused is charged, or is favorable and material to either guilt or to punishment.

c. "Synopsis of a witness' testimony" is that which the requesting counsel has a good faith basis to believe the witness will say, if called to testify. A synopsis shall be prepared as though the witness were speaking (first person), and shall be sufficiently detailed as to demonstrate both the testimony's relevance and that the witness has personal knowledge of the matter offered. See Enclosure 1, POM 10-2, for some suggestions.

d. "Disclosure" as used in this Order is synonymous with "production."

e. "Matter" includes any matter whatsoever that is required to be produced under the terms of this Order, whether tangible or intangible, including but not limited to, physical objects,

documents, audio, video or other recordings in any media, electronic data, studies, reports, or transcripts of testimony, whether from depositions, former commission hearings, or other sworn testimony.

13. Nothing in this Order shall be interpreted to require the disclosure of attorney work product to include notes, memoranda, or similar working papers prepared by counsel or counsel's trial assistants.

14. The Prosecution shall provide to the Defense the items listed below not later 31 Jan 2006. The items shall be provided to the detailed defense counsel unless the detailed defense counsel designates another lawful recipient of the items.

a. Evidence and copies of all information the prosecution intends to offer at trial.

b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Exculpatory evidence known to the prosecution.

e. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

2. Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.

3. Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.

f. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

15. The Defense shall provide to the detailed Prosecution the items listed below not later than 28 Feb 2006. The items shall be provided to the detailed prosecutor unless the detailed prosecutor designates another lawful recipient of the items. These provisions shall not require the defense to disclose any statement made by the accused, or to provide notice whether the accused shall be called as a witness.

- a. Evidence and copies of all matters the defense intends to offer at trial.
- b. The names and contact information of all witnesses the defense intends to call at trial along with a synopsis of the witness' testimony.
- c. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.
- d. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that were:
 - (1.) Sworn to, written or signed by, the witness.
 - (2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.
 - (3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.
- e. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any offense or any element of any offense.
- f. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.
- g. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

16. When Alternatives to Live Testimony Will Be Offered by a Party.

- a. The testimony of a witness may be offered by calling the person to appear as a witness before the Commission (live testimony) or by using alternatives to live testimony.
- b. Whenever this Order requires a party to disclose the names of witnesses to be called, a

Discovery Order, US v. al Qahtani, Page 4 of 5 Pages, Dec 21, 2005

RE 7 (al Qahtani)
Page 6 of 11

party which intends to offer an alternative to live testimony shall provide the notice below to the opposing party:

(1.) Intent to use alternatives to live testimony rather than calling the witness.

(2.) The method of presenting the alternative to live testimony the party intends to use. (See paragraph 3c(6)(a-g), POM 10-2, for examples),

(3.) The dates, locations, and circumstances - and the persons present - when the alternative was created, and

(4.) The reason(s) why the alternative will be sought to be used rather than production of live testimony.

17. Objections to Alternatives to Live Testimony.

If, after receiving a notice required by paragraph 16 above, the party receiving the notice wishes to prevent opposing counsel from using the proposed alternative to live testimony, the receiving party shall file a motion under the provisions of POM# 4-3. Such motion shall be filed within 5 days of disclosure of the intent to offer an alternative to live testimony, or the receiving party shall be deemed to have waived any objection to the use of an alternative to live testimony.

18. Obtaining or Creating Alternatives to Live Testimony - Notice and Opportunity to Attend and Participate.

a. Under Commission Law, confrontation of persons offering information to be considered by the Commission is not mandatory, nor is there a requirement for both parties to participate in obtaining or creating alternatives to live testimony. Further, there is no general rule against hearsay.

b. As a result, parties must afford opposing counsel sufficient notice and opportunity to attend witness interviews when such interviews are intended to preserve testimony for actual presentation to the Presiding Officer or other members of the Commission.

c. Failure to provide such notice as is practical may be considered - at the discretion of the Presiding Officer (or in a paragraph 6D(1), MCO# 1 determination, by the other Commission members) - along with other factors, on the issue of admissibility of the proffered testimony.

IT IS SO ORDERED:

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

Significant Commission Dates
United States v. _____

# ¹	Event	Date	Notes
1.	First session (without members) <ul style="list-style-type: none"> • Convening the Commission • Choice of counsel • Voir dire of PO • Pleas (ordinarily reserved) • Motions (ordinarily reserved) 		
2.	Provide copies of existing Protective Orders to PO		
3.	Submit Protective Orders for PO signature.		POM 9-1
4.	Discovery – Prosecution ²	xxx	
5.	Discovery – Defense ²	xxx	
6.	Requests for access to evidence		POM 7-1
7.	“Law” Motions: <i>Motion</i> ³		POM 4-3
8.	“Law” Motions: <i>Response</i>		POM 4-3
9.	“Law” Motions: <i>Reply</i>		POM 4-3
10.	Witness requests on law motions		POM 10-2
11.	Evidentiary motions: <i>Motion</i>		POM 4-3
12.	Evidentiary motions: <i>Response</i>		POM 4-3
13.	Evidentiary motions: <i>Reply</i>		POM 4-3
14.	Witness requests on evidentiary motions		POM 10-2
15.	Voir dire of members		
16.	Prosecution case in chief - <i>Merits</i>		Also indicate # of days to present
17.	Defense case in chief - <i>Merits</i>		Also indicate # of days to present
18.	Prosecution – <i>Sentencing</i>		Also indicate # of days to present
19.	Defense - <i>Sentencing</i>		Also indicate # of days to present
20.	Witness requests – merits and sentencing		POM 10-2
21.	Directed briefs ⁴	xxx	
22.	Requests to take conclusive notice		POM 6-2

¹ The requested dates do not have to be in the chronological order that they appear on this list. For example, counsel may request an earlier date for item 15 than they would for item 7.

² Discovery dates will be included in the discovery order.

³ A “law motion” is any motions except that to suppress evidence or address another evidentiary matter.

⁴ Dates will be established in the directed brief if directed briefs are used.

Hodges, Keith

From: Hodges, Keith
Sent: Wednesday, December 21, 2005 11:03 AM
Subject: Military Commission Business

Attachments: First PO instructions to Panel 2 dtd 1 Dec 05.pdf

1. On December 1, 2005, COL Chester sent you instructions concerning your possible service as a member of a Military Commission. A copy of those instructions is attached.
2. Since that time, two additional Presiding Officers have been appointed, and it is possible that if you sit as a Commission member, one of these officers could also be the Presiding Officer. The two other Presiding Officers are CAPT Daniel O'Toole, USN, and COL Ralph Kohlmann, U.S.M.C.
3. CAPT O'Toole and COL Kohlmann have adopted COL Chester's earlier (attached) instructions, and those instructions are now applicable to any Commission in which COL Chester, CAPT O'Toole, or COL Kohlmann is the Presiding Officer.
4. Please reply to me that you have received this email.
5. It does not appear likely that any Military Commission will need your services through the end of February 2006.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission

[REDACTED]



First PO Instructions
to Panel...

**Instructions to Prospective Commission Members
To be provided by APO to each prospective member.**

1 December 2005

This email is being sent to each prospective member by Keith Hodges, Assistant to the Presiding Officers for Military Commissions, at the direction of and on behalf of Colonel Chester.

- 1. I am Colonel Robert S. Chester. I am the Presiding Officer for Military Commissions to which you have been detailed.**
- 2. You have been detailed as a prospective member to a Military Commission convened to try one or more individuals now being detained at US Naval Station, Guantanamo Bay, Cuba. It is possible you will be detailed to hear a case with a different Presiding Officer in which case you will receive instructions from that officer.**
- 3. Each of you must respond by email to Mr. Hodges, the Assistant to the Presiding Officers, acknowledging receipt of these instructions. I am aware that you received an email from Mr. Hodges earlier, but acknowledge receipt of these instructions as well. Email will be the preferred method to provide you any information. You will not receive any classified emails concerning your service as a member, and you may not send any. Please also tell Mr. Hodges your home mailing address in the event we need to mail you something. (We find that mail to home addresses is quicker and nothing gets x-rayed.)**

Your personal-information will NOT be released to anyone else, and will ONLY be used for emergencies.

- 4. Due to the publicity that these cases may have already received, and recognizing the possibility of further publicity, each of you is instructed as follows:**

a. You may not discuss with anyone, other than as required to inform your military superiors and family of your duty status, your detail to this Commission as a prospective member. You must not listen to, look at, or read any accounts of alleged incidents involving these cases or any accounts of any proceedings in these cases, or any matters concerning the detention of detainees at Guantanamo. Please moderate your web surfing accordingly. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents to include any legal references. You may not discuss these cases with anyone, and if anyone attempts to discuss these cases with you, you must forbid them to do so and report the occurrence to me by emailing the Assistant, Mr. Hodges.

b. A trial by Military Commission includes the determination of the ability of each member to sit as a member. As a prospective member, you may be questioned in open session by counsel for either side or by myself to determine whether you should serve.

c. Trial by Military Commission requires members who approach the case with an open mind, and you must keep an open mind until all of the evidence and law has been presented and the Commission closes to deliberate. A Commission member should be as free as humanly possible from any preconceived ideas as to the facts or the law. From the date of receipt of these instructions, you must keep a completely open mind and wait until all of the evidence is presented, you have been instructed on the law to be applied, and the Commission has retired to deliberate before you discuss the facts of this case with anyone, including other Commission members.

5. Administrative matters:

a. If you believe there is a reason you should be excused from serving on the Commission and you request that you be excused, you may make such a request to the Appointing Authority through the Chief Clerk for Military Commissions (Mr. Harvey at email [REDACTED])

b. All sessions of the Commission will be held at Naval Base, Guantanamo Bay, Cuba. It is not known when the first session will be held, and you will be informed as soon as I know. All TDY costs will be born by the Office of Military Commissions. At Guantanamo:

1) You will be given the opportunity to access web based email. To do this, you will obviously have to know the web address for your command's Exchange server, or you must have a free web account such as hotmail, yahoo, or the like.

2) Normal cell phones will NOT work at Guantanamo. However, you will have access to Class A phone service on an as-needed basis.

c. Both Mr. Harvey and Mr. Hodges are authorized to send you administrative information concerning logistics, security clearances, uniforms, lodging, orders, travel and the like. They will not be communicating with you concerning the facts, the law, or any other aspect of any case.

/s/

Robert S. Chester
Colonel, USMC
Presiding Officer

UNITED STATES OF AMERICA

v.

JABRAN SAID BIN AL QAHTANI

a/k/a Salam al Farsi

a/k/a Hateb

a/k/a Jabran al Qahtan

a/k/a Saad Wazar Hatib Jabran

a/k/a Jabran Saad Wazar Sulayman

a/k/a Jabran Wazar

DISCOVERY ORDER (PO 2)

December 21, 2005

1. The Presiding Officer finds that to ensure a full and fair trial, the following ORDER is necessary.
2. This Order does not relieve any party of any duty to disclose those matters that Commission Law requires to be disclosed. Where this Order requires disclosure at times earlier or later than Commission Law provides or requires, the Presiding Officer has determined that such earlier or later disclosure is necessary for a full and fair trial.
3. All disclosures required by this Order are continuing in nature. The times set forth below apply to any matter known to exist, or reasonably believed to exist, on the date this Order is issued. If any matter required to be disclosed by this order is not known to exist on the date this Order is issued, but later becomes known, the party with the responsibility to disclose it under this Order will disclose it as soon as practicable, but not later than three duty days from learning that the matter exists. In those cases when any matter required to be disclosed by this Order, becomes known after the date of this Order, but the party is unable to obtain or produce it as required, the party shall give written (email) notice to opposing counsel within three duty days, said notice including a description of the nature of the item or matter and the date and time when it will be produced or disclosed.
4. Any matter that has been provided or disclosed to opposing counsel prior to the entry of this Order need not be provided again if only to comply with this Order.
5. Providing a list of witness names in compliance with this discovery Order does not constitute a witness request. Witness requests must be made in accordance with POM #10-2.
6. Neither the Presiding Officer nor the Assistant shall be provided with a copy of the items ordered to be produced or disclosed by this Order. If counsel believe there has not been adequate compliance with this Order, counsel shall seek relief using the procedures in POM 4-3 or POM 7-1, as appropriate.

7. Objections to the wording of this Order, or the authority to issue this Order. Counsel who object to the requirements of this discovery Order, the Presiding Officer's authority to issue a discovery order, or who seek any relief from the requirements of this Order shall file a motion in accordance with POM 4-3 NLT 31 Jan 2006.

8. Failure to disclose a matter as required by this Order may result in the imposition of those sanctions which the Presiding Officer determines are necessary to enforce this Order or to otherwise ensure a full and fair trial.

9. If any matter that this Order, or Commission Law, requires to be disclosed was in its original state in a language other than English, and the party making the disclosure has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also disclose a copy of the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

10. Each of the disclosure requirements of this Order shall be interpreted as a requirement to provide to opposing counsel a duplicate of the original of any matter to be disclosed. Transmittal of a matter to opposing counsel electronically satisfies the disclosure requirements herein and is the preferred method of production. When disclosure of any matter is impracticable or prohibited because of the nature of the item (a physical object, for example), or because it is protected or classified, the disclosing party shall permit the opposing counsel to inspect the item in lieu of providing it.

11. A party has not complied with this Order until that party has disclosed to detailed counsel for the opposing party - or another counsel lawfully designated by the detailed counsel - the matter required to be disclosed or provided.

12. Definitions:

a. "At trial." As used in this order, the term "at trial" means during the proponent party's case in chief (and not rebuttal or redirect), whether on merits or during sentencing. Matters to be disclosed which relate solely to sentencing will be so identified.

b. "Exculpatory evidence" includes any evidence that tends to negate the guilt of the accused, or mitigates any offense with which the accused is charged, or is favorable and material to either guilt or to punishment.

c. "Synopsis of a witness' testimony" is that which the requesting counsel has a good faith basis to believe the witness will say, if called to testify. A synopsis shall be prepared as though the witness were speaking (first person), and shall be sufficiently detailed as to demonstrate both the testimony's relevance and that the witness has personal knowledge of the matter offered. See Enclosure 1, POM 10-2, for some suggestions.

d. "Disclosure" as used in this Order is synonymous with "production."

e. "Matter" includes any matter whatsoever that is required to be produced under the terms of this Order, whether tangible or intangible, including but not limited to, physical objects,

documents, audio, video or other recordings in any media, electronic data, studies, reports, or transcripts of testimony, whether from depositions, former commission hearings, or other sworn testimony.

13. Nothing in this Order shall be interpreted to require the disclosure of attorney work product to include notes, memoranda, or similar working papers prepared by counsel or counsel's trial assistants.

14. The Prosecution shall provide to the Defense the items listed below not later 31 Jan 2006. The items shall be provided to the detailed defense counsel unless the detailed defense counsel designates another lawful recipient of the items.

a. Evidence and copies of all information the prosecution intends to offer at trial.

b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Exculpatory evidence known to the prosecution.

e. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

2. Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.

3. Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.

f. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

15. The Defense shall provide to the detailed Prosecution the items listed below not later than 28 Feb 2006. The items shall be provided to the detailed prosecutor unless the detailed prosecutor designates another lawful recipient of the items. These provisions shall not require the defense to disclose any statement made by the accused, or to provide notice whether the accused shall be called as a witness.

a. Evidence and copies of all matters the defense intends to offer at trial.

b. The names and contact information of all witnesses the defense intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

e. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any offense or any element of any offense.

f. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

g. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

16. When Alternatives to Live Testimony Will Be Offered by a Party.

a. The testimony of a witness may be offered by calling the person to appear as a witness before the Commission (live testimony) or by using alternatives to live testimony.

b. Whenever this Order requires a party to disclose the names of witnesses to be called, a
Discovery Order, US v. al Qahtani, Page 4 of 5 Pages, Dec 21, 2005

RE 8 (al Qahtani)
Page 4 of 5

party which intends to offer an alternative to live testimony shall provide the notice below to the opposing party:

(1.) Intent to use alternatives to live testimony rather than calling the witness.

(2.) The method of presenting the alternative to live testimony the party intends to use. (See paragraph 3c(6)(a-g), POM 10-2, for examples),

(3.) The dates, locations, and circumstances - and the persons present - when the alternative was created, and

(4.) The reason(s) why the alternative will be sought to be used rather than production of live testimony.

17. Objections to Alternatives to Live Testimony.

If, after receiving a notice required by paragraph 16 above, the party receiving the notice wishes to prevent opposing counsel from using the proposed alternative to live testimony, the receiving party shall file a motion under the provisions of POM# 4-3. Such motion shall be filed within 5 days of disclosure of the intent to offer an alternative to live testimony, or the receiving party shall be deemed to have waived any objection to the use of an alternative to live testimony.

18. Obtaining or Creating Alternatives to Live Testimony - Notice and Opportunity to Attend and Participate.

a. Under Commission Law, confrontation of persons offering information to be considered by the Commission is not mandatory, nor is there a requirement for both parties to participate in obtaining or creating alternatives to live testimony. Further, there is no general rule against hearsay.

b. As a result, parties must afford opposing counsel sufficient notice and opportunity to attend witness interviews when such interviews are intended to preserve testimony for actual presentation to the Presiding Officer or other members of the Commission.

c. Failure to provide such notice as is practical may be considered - at the discretion of the Presiding Officer (or in a paragraph 6D(1), MCO# 1 determination, by the other Commission members) - along with other factors, on the issue of admissibility of the proffered testimony.

IT IS SO ORDERED:

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

Hodges, Keith

From: Hodges, Keith
Sent: Wednesday, December 21, 2005 11:03 AM
Subject: Military Commission Business
Attachments: First PO instructions to Panel 2 dtd 1 Dec 05.pdf

1. On December 1, 2005, COL Chester sent you instructions concerning your possible service as a member of a Military Commission. A copy of those instructions is attached.
2. Since that time, two additional Presiding Officers have been appointed, and it is possible that if you sit as a Commission member, one of these officers could also be the Presiding Officer. The two other Presiding Officers are CAPT Daniel O'Toole, USN, and COL Ralph Kohlmann, U.S.M.C.
3. CAPT O'Toole and COL Kohlmann have adopted COL Chester's earlier (attached) instructions, and those instructions are now applicable to any Commission in which COL Chester, CAPT O'Toole, or COL Kohlmann is the Presiding Officer.
4. Please reply to me that you have received this email.
5. It does not appear likely that any Military Commission will need your services through the end of February 2006.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission

[REDACTED]



First PO Instructions
to Panel...

**Instructions to Prospective Commission Members
To be provided by APO to each prospective member.**

1 December 2005

This email is being sent to each prospective member by Keith Hodges, Assistant to the Presiding Officers for Military Commissions, at the direction of and on behalf of Colonel Chester.

1. I am Colonel Robert S. Chester. I am the Presiding Officer for Military Commissions to which you have been detailed.
 2. You have been detailed as a prospective member to a Military Commission convened to try one or more individuals now being detained at US Naval Station, Guantanamo Bay, Cuba. It is possible you will be detailed to hear a case with a different Presiding Officer in which case you will receive instructions from that officer.
 3. Each of you must respond by email to Mr. Hodges, the Assistant to the Presiding Officers, acknowledging receipt of these instructions. I am aware that you received an email from Mr. Hodges earlier, but acknowledge receipt of these instructions as well. Email will be the preferred method to provide you any information. You will not receive any classified emails concerning your service as a member, and you may not send any. Please also tell Mr. Hodges your home mailing address in the event we need to mail you something. (We find that mail to home addresses is quicker and nothing gets x-rayed.)
- Your personal-information will NOT be released to anyone else, and will ONLY be used for emergencies.
4. Due to the publicity that these cases may have already received, and recognizing the possibility of further publicity, each of you is instructed as follows:

- a. You may not discuss with anyone, other than as required to inform your military superiors and family of your duty status, your detail to this Commission as a prospective member. You must not listen to, look at, or read any accounts of alleged incidents involving these cases or any accounts of any proceedings in these cases, or any matters concerning the detention of detainees at Guantanamo. Please moderate your web surfing accordingly. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents to include any legal references. You may not discuss these cases with anyone, and if anyone attempts to discuss these cases with you, you must forbid them to do so and report the occurrence to me by emailing the Assistant, Mr. Hodges.

- b. A trial by Military Commission includes the determination of the ability of each member to sit as a member. As a prospective member, you may be questioned in open session by counsel for either side or by myself to determine whether you should serve.

RE 9 (al Qahtani)
Page 2 of 3

c. Trial by Military Commission requires members who approach the case with an open mind, and you must keep an open mind until all of the evidence and law has been presented and the Commission closes to deliberate. A Commission member should be as free as humanly possible from any preconceived ideas as to the facts or the law. From the date of receipt of these instructions, you must keep a completely open mind and wait until all of the evidence is presented, you have been instructed on the law to be applied, and the Commission has retired to deliberate before you discuss the facts of this case with anyone, including other Commission members.

5. Administrative matters:

a. If you believe there is a reason you should be excused from serving on the Commission and you request that you be excused, you may make such a request to the Appointing Authority through the Chief Clerk for Military Commissions (Mr. Harvey at email [REDACTED]).

b. All sessions of the Commission will be held at Naval Base, Guantanamo Bay, Cuba. It is not known when the first session will be held, and you will be informed as soon as I know. All TDY costs will be born by the Office of Military Commissions. At Guantanamo:

1) You will be given the opportunity to access web based email. To do this, you will obviously have to know the web address for your command's Exchange server, or you must have a free web account such as hotmail, yahoo, or the like.

2) Normal cell phones will NOT work at Guantanamo. However, you will have access to Class A phone service on an as-needed basis.

c. Both Mr. Harvey and Mr. Hodges are authorized to send you administrative information concerning logistics, security clearances, uniforms, lodging, orders, travel and the like. They will not be communicating with you concerning the facts, the law, or any other aspect of any case.

/s/

Robert S. Chester
Colonel, USMC
Presiding Officer

Hodges, Keith

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Tuesday, January 03, 2006 3:43 PM
To: [REDACTED]
[REDACTED]
[REDACTED]

Subject: RE: US v. al Qahtani: Directions of the Presiding Officer

Mr. Hodges:

I would like to have an 8-5 session to discuss this matter before sending any response. I have questions about the proposed session in Guantanamo, as well as some issues with the dates/deadlines in the discovery order. I believe a telephonic session with the interested parties can resolve many if not all of the issues, and would be more productive than either waiting until an initial hearing, and/or exchanging emails.

LTC Broyles

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Wednesday, December 21, 2005 11:42
To: [REDACTED]
[REDACTED]

Subject: US v. al Qahtani: Directions of the Presiding Officer

1. This email, and attachments 1 and 2, are being added to the filings inventory as PO 1. (See POM 12-1 for a description of the Filings Inventory.)
2. I am Keith Hodges, the Assistant to the Presiding Officer in the case in the subject line of this email. My duties are outlined in Presiding Officer Memorandum (POM - which serve as rules of court) 2-2. That POM, and all the others POMs, can be found at:
http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html. This email, and all others that I send that state "BY DIRECTION OF THE PRESIDING OFFICER" are sent at the Presiding Officer's direction. The Presiding Officer has directed that all the current POMs, to include as later modified or supplemented, are in effect for this case.
3. Your attention is invited to the enclosed Discovery Order (PO 2) for compliance by the parties.
4. NLT 5 Jan 06 the Presiding Officer wishes to know what is the earliest possible time that you and can attend a session of the Commission, without the other members, at Guantanamo to accomplish the following business ("Reply all" with your answer):
 - a. Initial session without members (convening of the Commission.)
 - b. Accused's election of counsel.
 - c. *Voir dire* of the Presiding Officer (materials to assist you in *voir dire* will be sent at a later time.)

RE 10 (al Qahtani)
Page 1 of 2

d. Discussion - and if necessary - litigation concerning the attached discovery order, its terms and enforceability.

e. Entry of pleas. (If the accused requests to defer pleas, the Presiding Officer advises he will grant the request.)

f. Motions. (If the parties request to defer motions - except a motion as to the wording, terms, and enforceability of the discovery order - the Presiding Officer advises he will grant the request.)

g. Setting a schedule for future sessions and the trial to include: law motions (motions other than on the admissibility or form of evidence); evidentiary motions; *voir dire* of the other members, and the trial. The dates the Presiding Officer will be looking at are those on the attached "Significant Dates Worksheet."

5. If you request a date in paragraph 4 above later than 13 February 2006, your reply must include the reasons for the delay and a calendar showing your activities and commitments - personal and professional - between 5 Jan 2006 and the date you request a delay that make it impossible to proceed by 13 February 2006.

6. NLT 5 Jan 06, the parties will provide the Presiding Officer, opposing counsel, and me a copy of all protective orders, issued by any authority, that they believe have been issued and remain in effect. Any party requesting a protective order from the Presiding Officer will use the procedures in POM 9-1.

7. Also attached is an email sent at the direction of the Presiding Officer adopting "first instructions" issued earlier by another Presiding Officer, COL Chester. The instructions that were adopted are also attached.

Three attachments:

- 1 - PO 2 - Discovery Order
- 2 - Significant dates worksheet
- 3 - Email on adopted "first instructions" and those instructions

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

[REDACTED]

<<Significant Commission Dates - worksheet v1.doc>> <<Email and attachment - First instructions by PO Chester adopted by POs O'Toole and Kohlmann, 21 Dec 05.pdf>> <<PO 2 - al Qahtani - Discovery Order - 21 Dec 05.pdf>>

RE 10 (al Qahtani)
Page 2 of 2

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Wednesday, January 04, 2006 1:14 PM
To: [REDACTED]
Subject: Results of Conference Call, US v. al Qahtani
Attachments: Memorandum of Conference Call - 3 Jan 06 - final.doc

CAPT O'Toole,

I prepared a draft of the attached memorandum. The Defense and Prosecution have jointly edited it, and I agree to the edits. I have modified the document sent to me only to remove the editing remarks and add page numbers.

I respectfully present the attachment to you for your consideration as part of your decision with regard to PO 1. This email thread, and the attachment, will be added to the PO 1 filings series.

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Wednesday, January 04, 2006 11:28 AM
To: 'Hodges, Keith'
Subject: FW: Re-edit of memo

<<Memorandum of Conference Call - 3 Jan 06.doc>>

This is the latest version, reviewed by both [REDACTED] per his email below, and myself.

LTC Broyles

-----Original Message-----

From: [REDACTED]
Sent: Wednesday, January 04, 2006 11:21
To: Broyles, Bryan, LTC, DoD OGC
Cc: [REDACTED]
Subject: FW: Re-edit of memo

RE 11 (al Qahtani)
Page 1 of 6

LTC Broyles,

Based upon my notes and recollection I concur with your additional edits to the memo drafted by Mr. Hodges and as it is currently written I would have no further additions. If per our conversation, you would please forward this email with your attached changes to Mr. Hodges so he may finalize the memo I would appreciate it.

V/R

[REDACTED]
Prosecutor, Office of Military Commissions
[REDACTED]

-----Original Message-----

From: Broyles, Bryan, LTC, DoD OGC

Sent: Wednesday, January 04, 2006 11:12

To: [REDACTED]

Subject: Re-edit of memo

<<Memorandum of Conference Call - 3 Jan 06.doc>>

Bryan Broyles
LTC, JA
[REDACTED]

RE 11 (al Qahtani)
Page 2 of 6

Memorandum of Conference Call – Mr. Hodges (APO), CPT [REDACTED] and LTC Broyles

1. Background.

a. On 21 Dec 05 and at the direction of the Presiding Officer, the APO sent out an email to all counsel in US v. al Qahanti currently on the filings inventory as PO 1. That filing contained certain dates that counsel were to reply by.

b. On 3 Jan 06, LTC Broyles, the detailed defense counsel, replied to the above mentioned email with the following:

Mr. Hodges:

I would like to have an 8-5 session to discuss this matter before sending any response. I have questions about the proposed session in Guantanamo, as well as some issues with the dates/deadlines in the discovery order. I believe a telephonic session with the interested parties can resolve many if not all of the issues, and would be more productive than either waiting until an initial hearing, and/or exchanging emails.

LTC Broyles

c. On 3 Jan 06, the APO called LTC Broyles and asked if he would be coming to GTMO for the Jan 06 session. (The APO asked this question to determine whether the 8-5 conference that LTC Broyles requested could be had at that time.) LTC Broyles stated he would not, though he wished to, because OMC had directed that only those involved with the cases being heard (al Bahlul and Khadr) go to GTMO. The APO requested that LTC Broyles find a Prosecutor on the case and arrange a conference call later in the day.

d. LTC Broyles did as requested above and the APO, LTC Broyles, and CPT [REDACTED] (Assistant prosecutor) were able to speak among each other.

e. The purpose of this document is to memorialize the discussion. It is not intended to be a transcript, but to capture relevant points for the PO to consider.

2. Initial remarks by the APO:

- a) The APO is just a clerk, and has no authority to make a decision.
- b) The APO's purpose in the conference call was to answer any questions he could as LTC Broyles email stated he had questions.
- c) The information gathered in the call would be provided to the PO (CAPT O'Toole) who was unavailable to participate.

3. Question/Issue # 1: Timing of any motion required by paragraph 7, PO 2 (Discovery Order) which reads:

7. Objections to the wording of this Order, or the authority to issue this Order. Counsel who object to the requirements of this discovery Order, the Presiding Officer's authority to issue a discovery order, or who seek any relief from the requirements of this Order shall file a motion in accordance with POM 4-3 NLT 31 Jan 2006.

a. LTC Broyles' concern was that 31 Jan 05 was the same date that the government was to complete discovery, and until discovery was furnished to the defense, the defense would be unable to file the motion.

b. The APO stated (and this is subject to confirmation by the Presiding Officer) that the requirement of paragraph 7 was to address only the four squares of the discovery order, its wording, the authority to issue it, and its requirements. For example, it was intended that the motion addressed in paragraph 7 might include:

(1) That the Prosecution was required to provide more (or less in the view of the Prosecution) than what the order required, or

(2) That the Defense was not required to provide any discovery, or required to provide less (or more in the view of the prosecution) than the order required.

c. The paragraph 7 motion (and this is subject to confirmation by the Presiding Officer) was not intended to require the parties to make a motion that the Prosecution had failed to provide something the order required. For example, if the prosecution did not disclose exculpatory evidence the defense had reason to believe existed, that would not be known to the defense until the close of prosecution discovery (31 Jan 06,) and so the defense could not be expected to file such a motion on 31 Jan 06. The APO stated (and this is subject to confirmation by the Presiding Officer) that the order and POM 4-3 (though that POM was not stated by number) started the clock to make a motion when a party first became aware of a basis to make a motion.

d. In the above exchange, the APO mentioned it was no accident that the prosecution's discovery due was the same as the motion date. This observation seemed to concern LTC Broyles so the APO advised that attempts were made to minimize the number of dates the parties and the PO had to track. When two desired due dates fell close together, it was found to be more efficient managerially to select the later date for both requirements. LTC Broyles' concern was that the language of paragraph 7 above seemed inclusive of motions for an extension of the defense deadline to make disclosure, which could not be reasonably made without first seeing the extent of the government disclosure.

e. LTC Broyles expressed concern about his ability to meet the defense discovery dates. He was advised that he is always welcome to request an extension, and in the past, they were almost always granted. (The APO notes here that only the PO, and not the APO, can grant an extension.)

4. Question/Issue # 2: Accused's election as to counsel.

a. LTC Broyles stated that though he met with Mr. al Qahanti in December 2005, he had not formed an attorney client relationship with Mr. al Qahtani, and could not make representations on his behalf. LTC Broyles thought it was improper for him to disclose at that point what exactly the client had said thus far on the matter of representation. (i.e., yes, no, maybe.)

b. When the APO asked about other counsel, LTC Broyles stated there was a civilian habeas counsel, but that they were not part of the commission defense team, and it was unlikely they would become part of the defense team and LTC Broyles is working with the Army Personnel JAG personnel to seek additional or an additional military counsel but yet has not had success.

5. Question/Issue # 3: Preparation versus representation.

a. This matter was raised by the APO to collect information that could assist the PO in making a decision. The APO explained that in other cases where there was a pro se issue there seemed to be a disconnect between representing a client - that a DC could not do against the client's wishes unless ordered to do so - versus preparing oneself to represent the client. The example given was that one could prepare to voir dire the Presiding Officer in possible anticipation the one would be required to represent the accused (not representation) versus conducting the voir dire (representation.) The other example would be preparing a motion for submission (not representation) versus filing the motion (representation.) LTC Broyles generally agreed with the distinctions, and that generally a DC could prepare to represent a client (see the above examples) without representing the client.

b. In the above context and pursuant to the APO's questions, LTC Broyles stated:

(1). He believed he could be prepared to conduct voir dire of the Presiding Officer before a session was held even if the accused did not wish LTC Broyles to represent him, and if directed to represent the accused, could conduct that voir dire with minimal delay (one day or less) if he had access to the client, and assuming he was given the materials regarding the Presiding Officer sufficiently in advance of any session.

(2). He believed that he could prepare the paragraph 7 discovery order motion (if he were to make one) even if the accused did not wish LTC Broyles to represent him, and if directed to represent the accused, could file the motion with minimal delay but would have to have some time (about a day) to discuss the matter with the client if he had access to the client.

6. Question/Issue # 4: Lawfulness of Sessions without all the members.

a. In what the APO would describe as a thinking-out-loud observation, LTC Broyles indicated that even if a session with the PO and not the other members could be

arranged, there was the issue whether the Presiding officer could proceed without having all the members present.

b. The APO stated that the POs were aware that was an issue which might be focused on the larger issue of whether MCO # 1 conflicts with the President's Military Order. In fact, COL Brownback in US v. Hicks directed a brief on that larger issue. The APO stated that this issue set up a "horse-cart" scenario of whether all the members had to be present to decide whether all the members could or must be present (or words to that effect.) LTC Broyles observed that he believed there was a substantive difference between a session taking/reserving pleas and motions and one where a matter was litigated, which was a term used in paragraph 4.d. of the email of 21 December from Mr. Hodges to all parties.

c. This matter was not further discussed, and the APO presumes (though not spoken to the parties) that such an issue would be addressed by motion.

KH



OFFICE OF THE
CHIEF PROSECUTOR

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

December 15, 2005

MEMORANDUM FOR LIEUTENANT [REDACTED] USNR
CAPTAIN [REDACTED] USAF

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No. 1, dated August 31, 2005, and Section 3B(9) of Military Commission Instruction No. 3, dated July 15, 2005, the above named counsel are detailed and designated as follows:

United States v. al Qhatani

Detailed Prosecutor:

Lieutenant [REDACTED] USNR

Detailed Assistant Prosecutor:

Captain [REDACTED] USAF

MORRIS D. DAVIS
Colonel, U.S. Air Force
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor

RE 12 (al Qahtani)
Page 1 of 1

Hodges, Keith

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Wednesday, January 04, 2006 11:04 AM
To: [REDACTED]

Subject: RE: US v. al Qahtani: Directions of the Presiding Officer

The defense's schedule is free for the week of the 13th of February.

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Wednesday, January 04, 2006 11:04
To: [REDACTED]

Subject: RE: US v. al Qahtani: Directions of the Presiding Officer

Thank you. Your email will be added to the filings inventory.

We look forward to hearing from the defense.

FOR THE PRESIDING OFFICER

Keith Hodges
 Assistant to the Presiding Officers
 Military Commission

From: [REDACTED]
Sent: Wednesday, January 04, 2006 10:30 AM
To: [REDACTED]

Subject: RE: US v. al Qahtani: Directions of the Presiding Officer

Mr. Hodges,

The government is available for an initial session in the subject case during the week of 13 February 2006.

The government does not, at this time, have any protective orders that are in effect in this case. However, the government may request protective orders in accordance with POM 9-1 in the future, should it be unable to come to agreement on a protective order with the defense prior to discovery.

RE 13 (al Qahtani)
 Page 1 of 3

Very Respectfully,

[REDACTED]
 Prosecutor, Office of Military Commissions
 Department of Defense
 [REDACTED]
 [REDACTED]

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Wednesday, December 21, 2005 11:42
To: [REDACTED]

Subject: US v. al Qahtani: Directions of the Presiding Officer

1. This email, and attachments 1 and 2, are being added to the filings inventory as PO 1. (See POM 12-1 for a description of the Filings Inventory.)
2. I am Keith Hodges, the Assistant to the Presiding Officer in the case in the subject line of this email. My duties are outlined in Presiding Officer Memorandum (POM - which serve as rules of court) 2-2. That POM, and all the others POMs, can be found at: http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html. This email, and all others that I send that state "BY DIRECTION OF THE PRESIDING OFFICER" are sent at the Presiding Officer's direction. The Presiding Officer has directed that all the current POMs, to include as later modified or supplemented, are in effect for this case.
3. Your attention is invited to the enclosed Discovery Order (PO 2) for compliance by the parties.
4. NLT 5 Jan 06 the Presiding Officer wishes to know what is the earliest possible time that you and can attend a session of the Commission, without the other members, at Guantanamo to accomplish the following business ("Reply all" with your answer):
 - a. Initial session without members (convening of the Commission.)
 - b. Accused's election of counsel.
 - c. *Voir dire* of the Presiding Officer (materials to assist you in *voir dire* will be sent at a later time.)
 - d. Discussion - and if necessary - litigation concerning the attached discovery order, its terms and enforceability.
 - e. Entry of pleas. (If the accused requests to defer pleas, the Presiding Officer advises he will grant the request.)
 - f. Motions. (If the parties request to defer motions - except a motion as to the wording, terms, and enforceability of the discovery order - the Presiding Officer advises he will grant

RE 13 (al Qahtani)

Page 2 of 3

the request.)

g. Setting a schedule for future sessions and the trial to include: law motions (motions other than on the admissibility or form of evidence); evidentiary motions; *voir dire* of the other members, and the trial. The dates the Presiding Officer will be looking at are those on the attached "Significant Dates Worksheet."

5. If you request a date in paragraph 4 above later than 13 February 2006, your reply must include the reasons for the delay and a calendar showing your activities and commitments - personal and professional - between 5 Jan 2006 and the date you request a delay that make it impossible to proceed by 13 February 2006.

6. NLT 5 Jan 06, the parties will provide the Presiding Officer, opposing counsel, and me a copy of all protective orders, issued by any authority, that they believe have been issued and remain in effect. Any party requesting a protective order from the Presiding Officer will use the procedures in POM 9-1.

7. Also attached is an email sent at the direction of the Presiding Officer adopting "first instructions" issued earlier by another Presiding Officer, COL Chester. The instructions that were adopted are also attached.

Three attachments:

- 1 - PO 2 - Discovery Order
- 2 - Significant dates worksheet
- 3 - Email on adopted "first instructions" and those instructions

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission



<<Significant Commission Dates - worksheet v1.doc>> <<Email and attachment - First instructions by PO Chester adopted by POs O'Toole and Kohlmann, 21 Dec 05.pdf>> <<PO 2 - al Qahtani - Discovery Order - 21 Dec 05.pdf>>

RE 13 (al Qahtani)
Page 3 of 3

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Friday, January 20, 2006 10:11 AM
To: [REDACTED]

Subject: PO 1 D: PO confirmation of APO <-> Counsel Discussion
Attachments: PO 1 B - al Qahtani - Memorandum of phone call sent to PO - 4 Jan 05.pdf

LTC Broyles, in paragraph 3 b of the phone conversation memorandum portion of PO 1 B (Copy attached) were two matters subject to confirmation by the Presiding Officer. The Presiding Officer confirms the remarks I made, those remarks being pasted below from PO 1 B.

b. The APO stated (and this is subject to confirmation by the Presiding Officer) that the requirement of paragraph 7 was to address only the four squares of the discovery order, its wording, the authority to issue it, and its requirements. For example, it was intended that the motion addressed in paragraph 7 might include:

- (1) That the Prosecution was required to provide more (or less in the view of the Prosecution) than what the order required, or
- (2) That the Defense was not required to provide any discovery, or required to provide less (or more in the view of the prosecution) than the order required.

c. The paragraph 7 motion (and this is subject to confirmation by the Presiding Officer) was not intended to require the parties to make a motion that the Prosecution had failed to provide something the order required. For example, if the prosecution did not disclose exculpatory evidence the defense had reason to believe existed, that would not be known to the defense until the close of prosecution discovery (31 Jan 06,) and so the defense could not be expected to file such a motion on 31 Jan 06. The APO stated (and this is subject to confirmation by the Presiding Officer) that the order and POM 4-3 (though that POM was not stated by number) started the clock to make a motion when a party first became aware of a basis to make a motion.

This email will be added to the filings inventory as PO 1 D.

BY DIRECTION OF THE PRESIDING OFFICER
Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

<<PO 1 B - al Qahtani - Memorandum of phone call sent to PO - 4 Jan 05.pdf>>

RE 14 (al Qahanti)
Page 1 of 1

**CAPTAIN DANIEL E. O'TOOLE
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES NAVY**

Captain Daniel E. O'Toole, Judge Advocate General's Corps, U.S. Navy, received a Juris Doctor degree from Wake Forest University School of Law in 1980 and is admitted to the North Carolina State Bar. He is a 1984 honors graduate of the Naval Justice School. He was awarded a Master of Laws degree from the George Washington University National Law Center in 1994 and he was the 2004 Distinguished Graduate of the 47th Military Judges Course, The Judge Advocate General's School, U.S. Army.

Following four years in private practice, principally engaged in criminal and civil litigation in state and federal courts, Captain O'Toole accepted a direct commission into the Navy JAG Corps. He served successively as Senior Defense Counsel and Senior Trial Counsel at Naval Legal Service Office, Newport, and then as Staff Judge Advocate, Naval Surface Group FOUR, Newport, Rhode Island. He transferred to Naval Air Station, Brunswick, Maine, in 1986, where he served as Staff Judge Advocate until 1988. He then transferred to Commander, Carrier Group EIGHT, embarked on USS JOHN F. KENNEDY (CV-67). Following that assignment, Captain O'Toole served as Assistant Fleet Judge Advocate, Commander Naval Air Force, U.S. Atlantic Fleet.

From 1990 to 1992, Captain O'Toole served as Command Judge Advocate on USS THEODORE ROOSEVELT (CVN-71). He then transferred to Joint Exercise Control Group, Ocean Venture 1992, as an exercise planner and controller. Following post-graduate school in 1994, Captain O'Toole was assigned to Commander, Naval Base, Norfolk, Virginia, as the Navy's first Mid-Atlantic Regional Environmental Counsel. In 1995, he transferred to Commander-in-Chief, U.S. Atlantic Fleet, with additional duty to U.S. Atlantic Command, as Environmental Counsel. When Trial Service Office East was established in the fall of 1996, with responsibility for the prosecution of Navy courts-martial throughout the eastern and central United States, Captain O'Toole was assigned as its first Executive Officer, and later as interim Commanding Officer. In the fall of 1999, Captain O'Toole transferred to the General Litigation Division, Office of the Judge Advocate General, as Deputy Director. While in the General Litigation Division, Captain O'Toole defended civil and criminal cases in state and federal district courts throughout the country, as well as various U.S. Circuit Courts of Appeal and the U.S. Court of Federal Claims.

In July 2001, Captain O'Toole was selected as Deputy Assistant Judge Advocate General (Management and Plans), and served simultaneously as the JAG Corps Officer Community Manager until September 2002, when he returned to the General Litigation Division as its Director. In March 2003, Captain O'Toole was selected by the Navy General Counsel as his Executive Assistant and Special Counsel, and he served in that capacity until his appointment as Circuit Military Judge, Tidewater Judicial Circuit, in July 2004.

During his nearly 14 years in the courtroom as a trial advocate and judge, Captain O'Toole has supervised, litigated, or presided over nearly a thousand cases, including national security and capital murder cases.

Captain O'Toole's personal decorations include the Legion of Merit with gold star in lieu of third award, the Meritorious Service Medal with three gold stars, the Navy Commendation Medal with two gold stars, the Joint Services Achievement Medal, and the Navy-Marine Corps Achievement Medal with gold star.

RE 15 (al Qahtani)
Page 1 of 1

Hodges, Keith

From: Hodges, Keith
Sent: Thursday, January 19, 2006 12:14 PM
To:

Cc:

Subject: Trial/Session Term of the Military Commission - 27 Feb - 3 Mar 2006

Attachments: Referred Commission Cases - 18 Jan 06 v2.doc

This email is to provide long-range planning guidance to all counsel in the following cases:

United States v al Bahlul
United States v Khadr
United States v al Qahtani
United States v Barhoumi
United States v al Sharbi
United States v Muhammad

All counsel on all the above cases are to respond to the Assistant that you received this email. Defense, please also pay special attention to paragraph 6 below.

1. The Commission will hold a trial/session term the week of 27 February 2006 at Guantanamo Bay Naval Station, Cuba. Counsel in the above named cases must be prepared to conduct any and all business before the Commission that can be conducted at that time. The individual Presiding Officers, through the Assistant, will work with counsel to determine the exact business to be addressed. Collectively, the Presiding Officers will set the exact schedule and publish it at a later date.
2. The Office of the Presiding Officers is advised that there are no Muslim Holy days during the above period. If addressees have different information, please advise soonest.
3. The first session of the Commission may be held as early as 1300, 27 February 2006. The last session may be held as late as COB Friday, 3 March 2006.
4. The Presiding Officers request that counsel for those cases that will not be in session at GTMO during this term still be present at GTMO so that the parties and the PO can work together to discuss issues and make plans. For example, at the last term, the parties were able to discuss and agree on the wording of Protective Orders. The Presiding Officers are aware of the limitations on conferences and discussions versus what must be resolved in a session. All counsel should obtain the appropriate country clearances and make other necessary logistical arrangements.

RE 16 (al Qahtani)
Page 1 of 3

5. If any counsel in the above listed cases cannot be at GTMO during the February trial/session term, advise the Assistant, and the Presiding Officer and opposing and other counsel on that case, **NLT 1200, EST (Monday) 23 January 2006** with the reasons for the unavailability.

6. All Defense counsel.

a. The fact that an attorney client relationship has not yet been established, or a client has indicated he wishes to proceed pro se, does not amount to "unavailability," and it may suggest a session in February is paramount. Counsel are encouraged to provide such information, however, as it might be useful in planning sessions.

b. Detailed Defense Counsel will advise if there are any other counsel (military or civilian) who are also detailed, or who may be detailed or may join the case in the future, and who are not on the attached list. If there are other such counsel, advise the Assistant, Presiding Officer, and other counsel on the case and provide email addresses and other contact information.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission



Referred
mmission Cases - 11

Referred Commission Cases – 18 Jan 06

Case	PO	Prosecution	Defense	Panel	Status
Hicks	Brownback		Mori – Det Lippert - Asst Dratel - Civ	05-0001 [REDACTED]	Stayed
al Qosi	Brownback		Shaeffer – Det Thompson - Asst	New panel ?	Stayed
Hamdan	Brownback		Swift – Det Autorino - Asst Katyal - Civ	New panel ?	Stayed
al Bahlul	Brownback		Fleener - Det	05-0003 [REDACTED]	First restart session held
Khadr	Chester		Merriam – Det Ahmad – Civ Wilson – Civ ?? Vokey	05-0004 [REDACTED]	First session held
al Qahtani	O'Toole		Broyles - Det	05-0008 [REDACTED]	
Barhoumi	O'Toole		Faulkner - Det	05-0007 [REDACTED]	
al Sharbi	O'Toole		Kuebler – Det	05-0006 [REDACTED]	
Muhammad	Kohlmann		Bradley – Det Stafford-Smith - Civ	05-0005 [REDACTED]	

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Monday, January 23, 2006 12:03 PM
To: [REDACTED]

Subject: PO 1 F (Trial Order, US v. Al Qahtani)

Attachments: Significant Commission Dates - worksheet - Feb trial term trial Order attachment.doc; CAPT O'Toole Biographical Summary - Voir Dire.pdf; PO 1 E - al Qahtani - Announcement of Feb trial term, 18 Jan 06.pdf; Protective Order 1 - al Qahtani - ID of all witnesses (23 Jan 06).pdf; Protective Order 2 - al Qahtani - ID of investigators (23 Jan 06).pdf; Protective Order 3 - al Qahtani - FOUO and other markings (23 Jan 06).pdf

1. This email Trial Order has been personally directed by the Presiding Officer in the subject case to prepare the parties for the February Trial term (27 Feb – 3 Mar 06.) It lists the functions that the parties are expected to perform at that trial term. This email and all replies will be added to the PO 1 filings series.

2. **Defense only – counsel choice.** Advise not later than 26 Jan 2006 whether you believe that you are representing the accused (i.e., the accused has *not* indicated he wishes to proceed pro se, and the accused *has* accepted your representation) and whatever information you have whether a civilian counsel will join the case (and the email address and contact information for that counsel.) This information is necessary not only so the business of the February trial term can be planned, but so the Presiding Officer can know why motions, filings, or other information might not be provided. *Note:* Even if counsel believe that an accused may wish to proceed pro se, or has or will reject the services of counsel, the parties will still prepare themselves to proceed in accordance with this Order.

3. **Existing Protective Orders.** The parties were directed in PO 1 to provide copies of all existing Protective Orders. None were provided and therefore the Presiding Officer presumes that none exist. If such orders exist, send them immediately. The PO 1 deadline was 5 Jan 2006.

4. Protective Orders.

a. The three attached Protective Orders have been issued pursuant to Commission Law *sua sponte* by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial.

b. Counsel who wish this order modified or rescinded shall follow the Procedures in POM 9-1.

5. Motions on the Discovery Order (PO 2.)

a. Counsel are reminded that in accordance with PO 1, the due date for any motion on the Discovery Order is 31 Jan 2006. Responses and replies will be filed in accordance with POM 4-3.

b. Any motion filed on the Discovery Order will be litigated during the February trial term.

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 Page 1 of 4

6. Voir dire. If counsel desire to voir dire and/or to challenge the Presiding Officer, this will be accomplished during the February trial term.

a. A mini biography of the Presiding Officer is attached to assist counsel.

b. Counsel are strongly encouraged to submit written question for the Presiding Officer. Such questions will be provided to the APO, Presiding Officer, and opposing counsel not later than 8 Feb 2006 in *Word (not PDF)* so the Presiding Officer can answer the questions in the same electronic file.

7. Setting a trial calendar. Not later than 15 Feb, counsel for both sides will complete the attached "Trial Schedule" filling in the appropriate dates and file it with the APO, Presiding Officer and opposing counsel.

8. Entry of pleas. The accused will be called upon to enter pleas. (If the accused requests to defer pleas, the Presiding Officer advises he will grant the request.)

9. Motions (other than on the Discovery Order.) Counsel may file motions in accordance with POM 4-3. Such motions a party desires litigated at the February trial term shall be filed not later than 6 Feb 2006. Responses shall be filed not later than 7 days from the filing of the motion. Replies, if desired, shall be filed not later than 3 days from when the response was filed. All filing will be done electronically. Be attentive to the requirements of POM 4-3.

10. Motions other than the Discovery Order and those motions filed in accordance with paragraph 9 above. The parties will be asked if they have motions or other motions if motions were made. (If the parties request to defer motions - except a motion as to the wording, terms, and enforceability of the Discovery Order - the Presiding Officer advises he will grant the request.)

11. Inability to perform functions and unavailability. If there is any reason why counsel cannot perform the functions listed in this Order, such matters will be filed with the APO, Presiding Officer, and opposing counsel not later than 26 Jan clearly indicating the functions that counsel cannot perform and the reasons therefore. It is noted that in an email sent on 19 January 2006 (PO 1 E copy attached,) counsel already have an obligation to advise on their possible non-availability. Paragraph 5 of that email stated:

5. If any counsel in the above listed cases cannot be at GTMO during the February trial/session term, advise the Assistant, and the Presiding Officer and opposing and other counsel on that case, NLT 1200, EST (Monday) 23 January 2006 with the reasons for the unavailability.

12. Representational issues and unavailability (Defense counsel.) Para 6 of PO 1 E stated:

6. All Defense counsel.

a. The fact that an attorney client relationship has not yet been established, or a client has indicated he wishes to proceed pro se, does not amount to "unavailability," and it may suggest a session in February is paramount. Counsel are encouraged to provide such information, however, as it might be useful in planning sessions.

b. Detailed Defense Counsel will advise if there are any other counsel (military or civilian) who are also detailed, or who may be detailed or may join the case in the future, and who

are not on the attached list. If there are other such counsel, advise the Assistant, Presiding Officer, and other counsel on the case and provide email addresses and other contact information.

Attachments to this email Trial Order

1. Three Protective Orders issued by the Presiding Officer
2. Mini-biography of the Presiding Officer
3. Trial schedule form (Significant Dates)
4. PO 1 E

BY DIRECTION OF THE PRESIDING OFFICER
Keith Hodges
Assistant to the Presiding Officers
Military Commission



<<Significant Commission Dates - worksheet - Feb trial term trial Order attachment.doc>> <<CAPT O'Toole Biographical Summary - Voir Dire.pdf>> <<PO 1 E - al Qahtani - Announcement of Feb trial term, 18 Jan 06.pdf>> <<Protective Order 1 - al Qahtani - ID of all witnesses (23 Jan 06).pdf>> <<Protective Order 2 - al Qahtani - ID of investigators (23 Jan 06).pdf>> <<Protective Order 3 - al Qahtani - FOUO and other markings (23 Jan 06).pdf>>

Significant Commission Dates

United States v. _____

Highlighting signifies modifications from the “worksheet” provided with PO 1.

# ¹	Event	Date	Notes
1.	First session (without members) <ul style="list-style-type: none"> • Convening the Commission • Choice of counsel • Voir dire of PO • Pleas (ordinarily reserved) • Motions (ordinarily reserved) • Discovery Order litigation 	27 Feb – 3 Mar 06	
2.	Provide copies of existing Protective Orders to PO	5 Jan 06 (Past due)	
3.	Submit Protective Orders for PO signature.		POM 9-1
4.	Discovery – Prosecution ²	xxx	
5.	Discovery – Defense ²	xxx	
6.	Requests for access to evidence		POM 7-1
7.	“Law” Motions: <i>Motion</i> ³		POM 4-3
8.	“Law” Motions: <i>Response</i>		POM 4-3
9.	“Law” Motions: <i>Reply</i>		POM 4-3
10.	Witness requests on law motions		POM 10-2
11.	Evidentiary motions: <i>Motion</i>		POM 4-3
12.	Evidentiary motions: <i>Response</i>		POM 4-3
13.	Evidentiary motions: <i>Reply</i>		POM 4-3
14.	Witness requests on evidentiary motions		POM 10-2
15.	Voir dire of members		
16.	Prosecution case in chief - <i>Merits</i>		Also indicate # of days to present
17.	Defense case in chief - <i>Merits</i>		Also indicate # of days to present
18.	Prosecution – <i>Sentencing</i>		Also indicate # of days to present
19.	Defense - <i>Sentencing</i>		Also indicate # of days to present
20.	Witness requests – merits and sentencing		POM 10-2
21.	Directed briefs ⁴	xxx	
22.	Requests to take conclusive notice		POM 6-2

¹ The requested dates do not have to be in the chronological order that they appear on this list. For example, counsel may request an earlier date for item 15 than they would for item 7.

² Discovery dates will be included in the discovery order.

³ A “law motion” is any motions except that to suppress evidence or address another evidentiary matter.

⁴ Dates will be established in the directed brief if directed briefs are used.


UNITED STATES OF AMERICA
v.
JABRAN SAID BIN AL QAHTANI
a/k/a Salam al Farsi
a/k/a Hatab
a/k/a Jabran al Qahtani
a/k/a Saad Wazar Habb Jabran
a/k/a Jabran Saad Wazar Sulayman
a/k/a Jabran Wazar

Protective Order # 1
Protection of Identities of
All Witnesses
23 January 2006

This Protective Order has been issued pursuant to Commission Law and stands by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. This Protective Order protects the identities or other identifying information of all individuals identified in materials provided to the Defense by the prosecution. In addition, this Order also applies to any identifying information obtained by the Defense during their independent discovery efforts.
2. The names and background information of witnesses are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).
3. Accordingly, IT IS HEREBY ORDERED:
 - a. Names or other identifying information of witnesses that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team; such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;
 - b. Names or other identifying information of any witness shall not be disclosed in open court or in any unsealed filing. Any mention of the names or other identifying information of witnesses must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal; and
 - c. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.
4. Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED


DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

UNITED STATES OF AMERICA
v.
JABRAN SAID BIN AL QAHTANI
a/k/a Salam al Farsi
a/k/a Hateb
a/k/a Jabran al Qahtan
a/k/a Saad Wazar Hatib Jabran
a/k/a Jabran Saad Wazar Sulayman
a/k/a Jabran Wazar

Protective Order # 2
Protection of Identities of
Investigators and Interrogators

23 January 2006

This Protective Order has been issued pursuant to Commission Law sua sponte by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. This Protective Order protects the identities of law enforcement, intelligence, or other investigators and interrogators working on behalf of their government (collectively referred to as "investigators and interrogators") who participated in the investigation of the accused.
2. The names and background information of investigators and interrogators are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).
3. Accordingly, IT IS HEREBY ORDERED:
 - a. Names or other identifying information of investigators and interrogators that have been or may, from time to time, be disseminated to Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below; and
 - b. Names or other identifying information of investigators and interrogators shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of investigators and interrogators must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal.
4. The following actions do not violate this protective order:
 - a. Showing pictures of individuals who had questioned the accused for the purposes of discussing the nature of those interrogations with the accused;

RE 19 (al Qahtani)
Page 1 of 2

b. Using "nicknames" or any other names (aliases) that the individual who questioned the accused told to the accused when questioned. This does NOT include any names that the accused may have learned through some other means other than the individual themselves; and

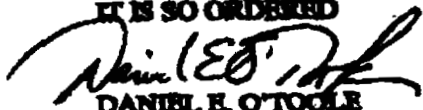
c. Using physical descriptions of the individual who questioned the accused for the purposes of the defense discussing with the accused that specific interrogation.

5. The protective order protects the true identity of the individual from release to the accused and the public and of course any private information relating to the individual (family names, addresses, phone numbers, etc.).

6. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

7. Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED


DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

UNITED STATES OF AMERICA
v.
JABRAN SAID BIN AL QAHTANI
a/k/a Salam al Farsi
a/k/a Hateb
a/k/a Jabran al Qahtan
a/k/a Saad Wazar Hatib Jabran
a/k/a Jabran Saad Wazar Sulayman
a/k/a Jabran Wazar

Protective Order # 3
Protection of "For Official Use Only" or "Law
Enforcement Sensitive" Marked Information
and Information with Classified Markings

23 January 2006

This Protective Order has been issued pursuant to Commission Law sua sponte by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. **Generally:** The following Order is issued to provide general guidance regarding the below-described documents and information. Unless otherwise noted, required, or requested, it does not preclude the use of such documents or information in open court.

2. **Scope:** This Order pertains to information, in any form, provided or disclosed to the defense team in their capacity as legal representatives of the accused before a military commission. Protection of information in regards to litigation separate from this military commission would be governed by whatever protective orders are issued by the judicial officer having cognizance over that litigation.

3. **Definition of Prosecution and Defense:** For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, counsel, paralegals, investigators, translators, administrative staff, and experts and consultants assisting the Defense in Military Commission proceedings against the accused. The term "Prosecution" includes all counsel, co-counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who participate in the prosecution, investigation, or interrogation of the accused.

4. **Effective Dates and Classified Information:** This Protective Order shall remain in effect until rescinded or modified by the Presiding Officer or other competent authority. This Order shall not be interpreted to suggest that information classified under the laws or regulations of the United States may be disclosed in a manner or to those persons inconsistent with those statutes or regulations.

5. **UNCLASSIFIED SENSITIVE MATERIALS:**

- a. IT IS HEREBY ORDERED that documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense ("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as

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Page 1 of 3

marked unless and until proper authority removes such marking. If either party wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Presiding Officer.

- b. IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

6. CLASSIFIED MATERIALS:

- a. IT IS FURTHER ORDERED that all parties shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.
- b. IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of this case's review and final decision by the President or, if designated, the Secretary of Defense, and any post-trial U.S. federal litigation that may occur.

7. BOOKS, ARTICLES, OR SPEECHES:

- a. FINALLY, IT IS ORDERED that neither members of the Defense team nor the Prosecution shall divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Defense team or the Prosecution shall submit any book, article, speech, or other publication derived from, or based upon information gained in the course of representation of the accused in military commission proceedings to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against the accused.
- b. The provisions in paragraph 7a apply to information learned in the course of representing the accused before this commission, no matter how that information was obtained. For example, paragraph 7a:
 - (1) Does not cover press conferences given immediately after a commission hearing answering questions regarding that hearing so long as it only addresses the aspects of the hearing that were open to the public.

(2) Does not cover public disclosures of information or experiences in representing the accused before this military commission which is already known and available in the public forum, such as open commission hearings, and motions filed and made available to the public.

(3) Does cover information or knowledge obtained through any means, including experience, that is not in the public forum, and would and could only be known through such an intimate interaction in the commission process (for example, a defense counsel's experience logistically in meeting a client).

8. **REQUEST FOR EXCEPTIONS:** Either party may file a motion, under seal and in accordance with POM 4-3 or 9-1 as appropriate, for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial and/or, if necessary, any appeal.

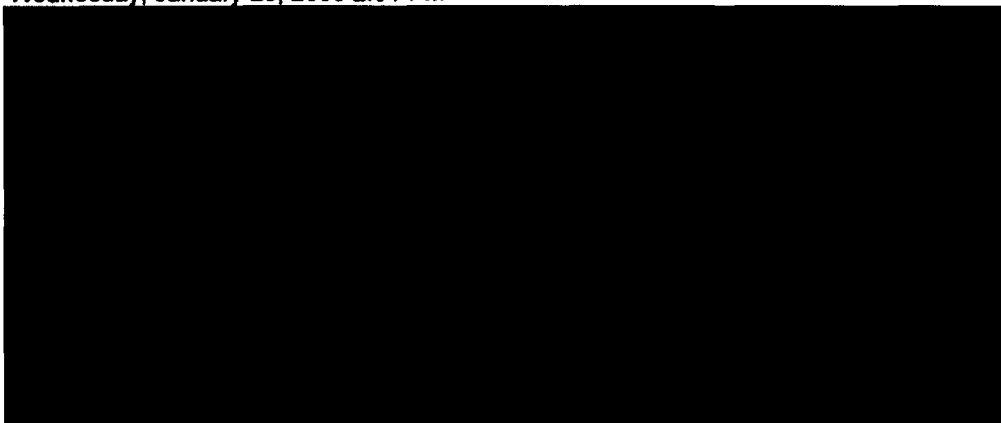
9. **BREACH:** Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED


DANIEL R. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

Hodges, Kelth

From: Hodges, Keith
Sent: Wednesday, January 25, 2006 2:01 PM
To:



Cc: Mr. D&D OGC
Subject: Preserving objections, concerns and issues: POM 4-3 and POM 12-1

To all counsel in all Military Commission Cases

1. The Presiding Officers have asked me to point out some features of the POMs of which you might be unaware. The POMs are the Rules of Court for the Presiding Officers and they describe the manner in which parties communicate with the Presiding Officers.

2. A main feature of POM 4-3 is that if a counsel wants relief, the counsel must comply with that POM - which means to file a motion. A main feature of the filings inventory POM (12-1) is that the only issues before the Presiding Officer are those listed on the filings inventory in the appropriate section (D for defense and P for Prosecution.) Taken together, this means that motions filed by the parties that meet the formatting and other requirements of POM 4-3 are placed on the filings inventory in the appropriate section. This document is available to the parties, and all can see what matters are before the Presiding Officer to resolve. If counsel believes that s/he has a motion or other request for relief pending before the Presiding Officer and it is not on the filings inventory in the appropriate section, then counsel must take action to file; if counsel believes a motion has already been filed, work with me so we can find that filing and ensure it gets on the list. How you raise matters on the record - by which I mean during a session - with the Presiding Officer is outside the scope of this email. This email addresses only communications outside the record - by which I mean not during a session.

4. The PO (Presiding Officer) section of the filings inventory reflects only those significant matters that the Presiding Officer sends or elects to place there so that there is a record of them. An email from counsel, containing an objection or other request for relief, might find its way into the PO section. But, if the counsel wants that objection to be resolved by the Presiding Officer, counsel must file in accordance with POM 4-3. Only when that is done will the filing be placed on the filings inventory in the appropriate P or D section and the matter preserved.

5. I point out these features so that all may appreciate that an objection, concern, observation, or request for relief in the body of an email is not a motion under POM 4-3 and therefore will not be added to the filings inventory in the P or D section. So, as an example, suppose in an email a prosecution counsel said, "I object to X." That is not a motion IAW POM 4-3, and unless the Presiding Officer directed otherwise, it would be not added to the Prosecution section of the filings inventory. Since that objection is not in the Prosecution section of

RE 21 (al Qahtani)

Page 1 of 2

the filings inventory, it is not before the Presiding Officer for resolution. Of course, the same analysis would hold true if the defense counsel said, "I object to X."

6. Finally, please appreciate the reason behind the inter-relationship between POM 4-3 and 12-1. The parties and the Presiding Officer deserve to know what matters are before the Presiding Officer. Notwithstanding all the advantages of email, its downside is that what one person views as a casual observation, discussion, or a prelude to a motion to be made could be viewed by another as having preserved a matter to go before the Commission and/or on appeal. The only way to ensure all know what is intended by an email, what matters they are expected to respond to or resolve, to ensure issues for the Presiding Officer to resolve are preserved, and to prevent inadvertent waiver is to have a system that lists such matters and is available to all.

7. A copy of this email will be placed in the filings inventory of all cases. A filings inventory in all cases that have not been stayed will be sent later this week.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Wednesday, January 25, 2006 3:11 PM
To: [REDACTED]

Subject: PO 1 G (US v. Al Qahtani)

Attachments: PO 1 F - al Qahtani - Trial order for Feb Term (23 Jan 06).pdf

The Presiding Officer has directed the following response to your email of 23 January 2006. That email and this one will be added to the filings inventory as PO 1 G.

Please refer to the Assistant's email of 25 January 2006 (PO 4, attached) that addresses the mechanism by which to file objections, motions, or other requests for relief pursuant to the various applicable Presiding Officer Memos (POMs). Email not in the form of a POM 4-3 motion or request for relief is not sufficient to raise or preserve issues, nor to obtain relief. While your email will be placed in the PO (Presiding Officer) series of the filings inventory for record purposes only, it is insufficient as the basis for any relief. Any matter requiring relief must be the subject of a timely and properly filed motion as required by the POMs (generally POM 4-3). The following additional information is provided to assist you in this early stage of proceedings.

1. Regarding paragraph 1 of the below email (The paragraphs in your email below have been numbered for the convenience of this reply):

a. While you did inform the Assistant as to the status of your representation of Mr. al Qahtani, that was on 3 Jan 2006. You are on notice to comply with paragraph 1 of PO 1 F (email Trial Order) regarding your current status and be prepared to do so at the session beginning 27 Feb 2006.

b. If you have been unable to meet with Mr. al Qahtani to learn of his desires for representation and you need an Order from the Presiding Officer in order to resolve an access problem, you may apply for such assistance and additional time as you believe is needed by filing a motion in accordance with POM 4-3.

c. If you wish to make a motion asserting a lack of jurisdiction or other procedural defect that you believe exempts or precludes you from performing certain functions, you should set forth the basis of your lawful noncompliance or legal impediment and request relief from the orders in a motion filed in accordance with POM 4-3; however, until granted any requested relief from the existing orders, you are on notice to comply with them and to be prepared for the commission session on 27 Feb 2006. (POM 4-3 also provides a mechanism to request extensions for filing motions.)

2. Regarding paragraph 2 of your email below: The extent of voir dire to be conducted during the 27 Feb 2006 session will be voir dire of the Presiding Officer. The Presiding Officer is prepared to respond to any written questions you wish to propound in advance in order to assist you in being prepared to conduct voir dire on the record at the 27 Feb 2006 session of the commission (See PO 1 F.) If you choose not to avail yourself and your prospective client of this opportunity to prepare, you are on notice to be prepared nevertheless. If you believe that you are unable to prepare to conduct voir dire due to a practical or legal impediment for which you need assistance or relief, you may set forth the basis of that inability in a motion in accordance with POM 4-3 and request such assistance or relief as required in

RE 22 (al Qahtani)

Page 1 of 6

order to be prepared for the commission session on 27 Feb 2006, including voir dire of the Presiding Officer. Finally, if you wish to voir dire anyone that is not a member of the commission – which would include the Assistant - you should request to do so by motion filed in accord with POM 4-3.

3. Regarding paragraphs 3, 4, 5 and 7 of your email below: The Protective Orders issued in this case by the Presiding Officer remain in effect until the Presiding Officer modifies or rescinds them. If you desire any modification or relief from these Protective Orders, you should file an appropriate motion under POM 9-1 or 4-3.

4. Regarding paragraph 6 of your email below concerning the PO's authority to act: If you wish to make a motion asserting a lack of jurisdiction or other procedural defect, or you wish to preserve such an issue, you should do so by motion filed in accordance with POM 4-3. Until you are granted relief pursuant to a properly filed motion, you are on notice that you have been ordered to comply with the requirements of PO 1 F (email Trial Order).

Attachment:

1. PO 1 F.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Monday, January 23, 2006 3:27 PM
To: [REDACTED]

Subject: RE: PO 1 F (Trial Order, US v. Al Qahtani)

CAPT O'Toole,

1. Regarding point #2, I believe I've fully informed you, via Mr. Hodges, regarding my status on that subject. Based on that status, I will not be filing any motions or responding to any discovery by the deadlines listed below. Further, I request that I be allowed sufficient time after the 27 February hearings to adequately prepare such motions.

2. Regarding voir dire, I'm uncertain yet as to the extent voir dire will be conducted, but I'm unable to present questions in advance to you, given my status noted above. Additionally, assuming I am ultimately in a capacity to do so, I request the opportunity to voir dire Mr. Hodges as well as yourself. To make this more efficient, I am requesting a similar information sheet be provided to me on Mr. Hodges.

3. Regarding the protective orders, I have a number of issues. First, I dispute your authority to issue these orders, as you are not yet the Presiding Officer of any commission, as no commission has yet convened in which you are the detailed Presiding Officer. While I acquiesce to your authority to make logistical arrangements in advance of the convening of the commission, I do not so acquiesce to your authority to make substantive decisions.

RE 22 (al Qahtani)
Page 2 of 6

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4. Second, the Prosecution, as far as I am aware, has made no request for any protective orders. Further, there has been neither a showing of necessity, nor ANY showing regarding the matters within the protective orders (and, given that no commission has yet convened, they cannot be faulted for not yet doing so). I do not and cannot agree to the protective orders included with this email, both due the unnecessarily broad language, and the lack of authority for their issuance. POM 9-1 does not allow for the sua sponte issuance by the Presiding Officer, and in fact calls for both parties to present their positions regarding the *necessity* of such an order. While MCO 1, 6D(5)(a) "Protective Orders" is silent on the sua sponte authority of the Presiding Officer of a duly convened commission, that stands in stark contrast to 6D(5)(b) "Limited Disclosure" which specifically notes such authority. By this sua sponte order, you have made conclusions of law and fact with no support, to the detriment of Mr. al Qahtani's substantive legal rights.

5. Additionally, on its face, the order does not restrict the Prosecution in disseminating this information in any way. If the information in question is in fact sufficiently sensitive as to require protection, it should be equally protected from disclosure by the Prosecution.

6. Until such time as the Commission is convened, thereby empowering the Presiding Officer to issue orders, I am willing to agree to limited disclosure of the matters served upon me by the Prosecution. Given my lack of adequate access to Mr. al Qahtani, I will have only one opportunity to meet him prior to the scheduled convening of the commission and so my ability to disclose the information to him is extremely limited in any event. I am willing to agree to some degree of limited disclosure temporarily. I believe such terms can be agreed between the Prosecution and myself.

7. I should also note that the limitations in the Protective Orders, as issued, will prevent me from representing Mr. al Qahtani in any meaningful way, will prevent him from having any role in assisting in his own defense, deny him substantially any confrontation and in fact, I believe they constitute a conflict of interest of such severity as to cause me to question my ability to meet my ethical obligations pursuant to the Kentucky Professional Conduct Rules.

LTC Bryan Broyles

-----Original Message-----

From: Hodges, Keith [REDACTED]

Sent: Monday, January 23, 2006 12:03

To: [REDACTED]

Subject: PO 1 F (Trial Order, US v. Al Qahtani)

1. This email Trial Order has been personally directed by the Presiding Officer in the subject case to prepare the parties for the February Trial term (27 Feb - 3 Mar 06.) It lists the functions that the parties are expected to perform at that trial term. This email and all replies will be added to the PO 1 filings series.

2. **Defense only - counsel choice.** Advise not later than 26 Jan 2006 whether you believe that you are representing the accused (i.e., the accused has *not* indicated he wishes to proceed pro se, and the accused *has* accepted your representation) and whatever information you have whether a civilian counsel will join the case (and the email address and contact information for that counsel.) This information is necessary not only so the business of the February trial term can be planned, but so the Presiding Officer can know why motions, filings, or other information might not be

RE 22 (al Qahtani)

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provided. *Note:* Even if counsel believe that an accused may wish to proceed pro se, or has or will reject the services of counsel, the parties will still prepare themselves to proceed in accordance with this Order.

3. Existing Protective Orders. The parties were directed in PO 1 to provide copies of all existing Protective Orders. None were provided and therefore the Presiding Officer presumes that none exist. If such orders exist, send them immediately. The PO 1 deadline was 5 Jan 2006.

4. Protective Orders.

a. The three attached Protective Orders have been issued pursuant to Commission Law *sua sponte* by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial.

b. Counsel who wish this order modified or rescinded shall follow the Procedures in POM 9-1.

5. Motions on the Discovery Order (PO 2.)

a. Counsel are reminded that in accordance with PO 1, the due date for any motion on the Discovery Order is 31 Jan 2006. Responses and replies will be filed in accordance with POM 4-3.

b. Any motion filed on the Discovery Order will be litigated during the February trial term.

6. Voir dire. If counsel desire to voir dire and/or to challenge the Presiding Officer, this will be accomplished during the February trial term.

a. A mini biography of the Presiding Officer is attached to assist counsel.

b. Counsel are strongly encouraged to submit written question for the Presiding Officer. Such questions will be provided to the APO, Presiding Officer, and opposing counsel not later than 8 Feb 2006 in *Word (not PDF)* so the Presiding Officer can answer the questions in the same electronic file.

7. Setting a trial calendar. Not later than 15 Feb, counsel for both sides will complete the attached "Trial Schedule" filling in the appropriate dates and file it with the APO, Presiding Officer and opposing counsel.

8. Entry of pleas. The accused will be called upon to enter pleas. (If the accused requests to defer pleas, the Presiding Officer advises he will grant the request.)

9. Motions (other than on the Discovery Order.) Counsel may file motions in accordance with POM 4-3. Such motions a party desires litigated at the February trial term shall be filed not later than 6 Feb 2006. Responses shall be filed not later than 7 days from the filing of the motion. Replies, if desired, shall be filed not later than 3 days from when the response was filed. All filing will be done electronically. Be attentive to the requirements of POM 4-3.

10. Motions other than the Discovery Order and those motions filed in accordance with paragraph 9 above. The parties will be asked if they have motions or other motions if motions were made. (If the parties request to defer motions - except a motion as to the wording, terms, and

RE 22 (al Qahtani)

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enforceability of the Discovery Order - the Presiding Officer advises he will grant the request.)

11. Inability to perform functions and unavailability. If there is any reason why counsel cannot perform the functions listed in this Order, such matters will be filed with the APO, Presiding Officer, and opposing counsel not later than 26 Jan clearly indicating the functions that counsel cannot perform and the reasons therefore. It is noted that in an email sent on 19 January 2006 (PO 1 E copy attached,) counsel already have an obligation to advise on their possible non-availability. Paragraph 5 of that email stated:

5. If any counsel in the above listed cases cannot be at GTMO during the February trial/session term, advise the Assistant, and the Presiding Officer and opposing and other counsel on that case, **NLT 1200, EST (Monday) 23 January 2006** with the reasons for the unavailability.

12. Representational issues and unavailability (Defense counsel.) Para 6 of PO 1 E stated:

6. All Defense counsel.

a. The fact that an attorney client relationship has not yet been established, or a client has indicated he wishes to proceed pro se, does not amount to "unavailability," and it may suggest a session in February is paramount. Counsel are encouraged to provide such information, however, as it might be useful in planning sessions.

b. Detailed Defense Counsel will advise if there are any other counsel (military or civilian) who are also detailed, or who may be detailed or may join the case in the future, and who are not on the attached list. If there are other such counsel, advise the Assistant, Presiding Officer, and other counsel on the case and provide email addresses and other contact information.

Attachments to this email Trial Order

1. Three Protective Orders issued by the Presiding Officer
2. Mini-biography of the Presiding Officer
3. Trial schedule form (Significant Dates)
4. PO 1 E

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

<<Significant Commission Dates - worksheet - Feb trial term trial Order attachment.doc>> <<CAPT O'Toole Biographical Summary - Voir Dire.pdf>> <<PO 1 E - al Qahtani - Announcement of Feb trial term, 18 Jan 06.pdf>> <<Protective Order 1 - al Qahtani - ID of all witnesses (23 Jan 06).pdf>> <<Protective Order 2 - al Qahtani - ID of investigators (23 Jan 06).pdf>> <<Protective Order 3 - al Qahtani - FOUO and other markings (23 Jan 06).pdf>>

RE 22 (al Qahtani)
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Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Wednesday, January 25, 2006 5:11 PM
To: [REDACTED]

Subject: RE: Three Protective Orders - al Qahtani

Attachments: PO 1 G - al Qahtani - POs response to DDC's comments RE PO 1 F, 25 Jan 06.pdf; PO 4 - al Qahtani - 25 Jan APO email RE Preserving Objections and POM 4-3 and 12-1.pdf

The Presiding Officer has directed that the below email (as well as the email sent as part of PO 1 G) not be accepted as a filings for the D section of the filings inventory. Should you desire relief from the subject Orders, you are directed to comply with the applicable POM (POM 4-3 or 9-1 as appropriate). See also PO 4, attached.

The below email and this email will be added to the filings inventory as PO 1 H.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

Attachments

1. PO 1 G
2. PO 4

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Wednesday, January 25, 2006 7:38 AM
To: [REDACTED]

Subject: RE: Three Protective Orders - al Qahtani

CAPT O'Toole,

I renew my earlier objections, and do not acknowledge that these orders are binding in any way.

LTC Broyles

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Tuesday, January 24, 2006 19:02
To: [REDACTED]

RE 23 (al Qahtani)
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[REDACTED]
Subject: Three Protective Orders - al Qahtani

Earlier, the parties were provided with three Protective Orders. Those orders, consistent with the POMs, did not have "wet" signatures.

Because a Protective Order could be used outside of OMC, those Orders have been wet-signed, scanned, and attached.

FOR THE PRESIDING OFFICER
Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

<<Protective Order 3 - al Qahtani - FOUO and other markings (23 Jan 06) Signed.pdf>> <<Protective Order 1 - al Qahtani - ID of all witnesses (23 Jan 06) Signed.pdf>> <<Protective Order 2 - al Qahtani - ID of investigators (23 Jan 06) Signed.pdf>>

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Thursday, January 26, 2006 9:50 AM
To: [REDACTED]

Subject: RE: PO 1 G (US v. Al Qahtani)

Attachments: PO 4 - al Qahtani - 25 Jan APO email RE Preserving Objections and POM 4-3 and 12-1.pdf

1. The Presiding Officer appreciates the courtesy of your email below.
2. With respect to any request, motion, or other issue, please refer to the response to your preceding email and to PO 4 which was previously provided to you and is also attached hereto.
3. POM 9-1 directs that the parties meet together on the matter of Protective Orders. It also directs that the Presiding Officer not be involved in the preliminary discussions until such discussions are unproductive. Follow POM 9-1.
4. The forgoing response, as well as your below email, have not been placed in the filings inventory. See PO 4 (attached.)

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Wednesday, January 25, 2006 4:01 PM
To: [REDACTED]

Subject: RE: PO 1 G (US v. Al Qahtani)

CAPT O'Toole:

Sir, I previously provided the information regarding my status as Detailed Counsel only, and that status has not changed. I will again meet with Mr. al Qahtani on or about 6 February. I wanted to meet with him again during the week of the hearings last month, but was not allowed. Currently, I am required to make the request to travel to Gitmo 20 days in advance of expected travel and I cannot speak to him by telephone.

I do not at this time represent Mr. al Qahtani. I cannot make motions on his behalf. Should that status change, I

RE 24 (al Qahtani)
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will notify all parties. I will be present and prepared for the 27 February hearing term. I repeat my request for materials to assist in the voir dire of Mr. Hodges so that that can be accomplished at this hearing rather than put off to a future date, simply as a matter of expediency for the tribunal.

I again request that the prosecution meet with me to discuss limitations on disclosure of matters they intend to serve on me as Detailed Counsel.

LTC Broyles

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Wednesday, January 25, 2006 15:11
To: [REDACTED]

Subject: PO 1 G (US v. Al Qahtani)

The Presiding Officer has directed the following response to your email of 23 January 2006. That email and this one will be added to the filings inventory as PO 1 G.

Please refer to the Assistant's email of 25 January 2006 (PO 4, attached) that addresses the mechanism by which to file objections, motions, or other requests for relief pursuant to the various applicable Presiding Officer Memos (POMs). Email not in the form of a POM 4-3 motion or request for relief is not sufficient to raise or preserve issues, nor to obtain relief. While your email will be placed in the PO (Presiding Officer) series of the filings inventory for record purposes only, it is insufficient as the basis for any relief. Any matter requiring relief must be the subject of a timely and properly filed motion as required by the POMs (generally POM 4-3). The following additional information is provided to assist you in this early stage of proceedings.

1. Regarding paragraph 1 of the below email (The paragraphs in your email below have been numbered for the convenience of this reply):

a. While you did inform the Assistant as to the status of your representation of Mr. al Qahtani, that was on 3 Jan 2006. You are on notice to comply with paragraph 1 of PO 1 F (email Trial Order) regarding your current status and be prepared to do so at the session beginning 27 Feb 2006.

b. If you have been unable to meet with Mr. al Qahtani to learn of his desires for representation and you need an Order from the Presiding Officer in order to resolve an access problem, you may apply for such assistance and additional time as you believe is needed by filing a motion in accordance with POM 4-3.

c. If you wish to make a motion asserting a lack of jurisdiction or other procedural defect that you believe exempts or precludes you from performing certain functions, you should set forth the basis of your lawful noncompliance or legal impediment and request relief from the orders in a motion filed in accordance with POM 4-3; however, until granted any requested relief from the existing orders, you are on notice to comply with them and to be prepared for the commission session on 27 Feb 2006. (POM 4-3 also provides a mechanism to request extensions for filing motions.)

2. Regarding paragraph 2 of your email below: The extent of voir dire to be conducted during the
RE 24 (al Qahtani)

Page 2 of 7

27 Feb 2006 session will be voir dire of the Presiding Officer. The Presiding Officer is prepared to respond to any written questions you wish to propound in advance in order to assist you in being prepared to conduct voir dire on the record at the 27 Feb 2006 session of the commission (See PO 1 F.) If you choose not to avail yourself and your prospective client of this opportunity to prepare, you are on notice to be prepared nevertheless. If you believe that you are unable to prepare to conduct voir dire due to a practical or legal impediment for which you need assistance or relief, you may set forth the basis of that inability in a motion in accordance with POM 4-3 and request such assistance or relief as required in order to be prepared for the commission session on 27 Feb 2006, including voir dire of the Presiding Officer. Finally, if you wish to voir dire anyone that is not a member of the commission - which would include the Assistant - you should request to do so by motion filed in accord with POM 4-3.

3. Regarding paragraphs 3, 4, 5 and 7 of your email below: The Protective Orders issued in this case by the Presiding Officer remain in effect until the Presiding Officer modifies or rescinds them. If you desire any modification or relief from these Protective Orders, you should file an appropriate motion under POM 9-1 or 4-3.

4. Regarding paragraph 6 of your email below concerning the PO's authority to act: If you wish to make a motion asserting a lack of jurisdiction or other procedural defect, or you wish to preserve such an issue, you should do so by motion filed in accordance with POM 4-3. Until you are granted relief pursuant to a properly filed motion, you are on notice that you have been ordered to comply with the requirements of PO 1 F (email Trial Order).

Attachment:

1. PO 1 F.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Monday, January 23, 2006 3:27 PM
To: [REDACTED]

Subject: RE: PO 1 F (Trial Order, US v. Al Qahtani)

CAPT O'Toole,

1. Regarding point #2, I believe I've fully informed you, via Mr. Hodges, regarding my status on that subject. Based on that status, I will not be filing any motions or responding to any discovery by the deadlines listed below. Further, I request that I be allowed sufficient time after the 27 February hearings to adequately prepare such motions.

RE 24 (al Qahtani)
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1/26/2006

2. Regarding voir dire, I'm uncertain yet as to the extent voir dire will be conducted, but I'm unable to present questions in advance to you, given my status noted above. Additionally, assuming I am ultimately in a capacity to do so, I request the opportunity to voir dire Mr. Hodges as well as yourself. To make this more efficient, I am requesting a similar information sheet be provided to me on Mr. Hodges.

3. Regarding the protective orders, I have a number of issues. First, I dispute your authority to issue these orders, as you are not yet the Presiding Officer of any commission, as no commission has yet convened in which you are the detailed Presiding Officer. While I acquiesce to your authority to make logistical arrangements in advance of the convening of the commission, I do not so acquiesce to your authority to make substantive decisions.

4. Second, the Prosecution, as far as I am aware, has made no request for any protective orders. Further, there has been neither a showing of necessity, nor ANY showing regarding the matters within the protective orders (and, given that no commission has yet convened, they cannot be faulted for not yet doing so). I do not and cannot agree to the protective orders included with this email, both due the unnecessarily broad language, and the lack of authority for their issuance. POM 9-1 does not allow for the sua sponte issuance by the Presiding Officer, and in fact calls for both parties to present their positions regarding the *necessity* of such an order. While MCO 1, 6D(5)(a) "Protective Orders" is silent on the sua sponte authority of the Presiding Officer of a duly convened commission, that stands in stark contrast to 6D (5)(b) "Limited Disclosure" which specifically notes such authority. By this sua sponte order, you have made conclusions of law and fact with no support, to the detriment of Mr. al Qahtani's substantive legal rights.

5. Additionally, on its face, the order does not restrict the Prosecution in disseminating this information in any way. If the information in question is in fact sufficiently sensitive as to require protection, it should be equally protected from disclosure by the Prosecution.

6. Until such time as the Commission is convened, thereby empowering the Presiding Officer to issue orders, I am willing to agree to limited disclosure of the matters served upon me by the Prosecution. Given my lack of adequate access to Mr. al Qahtani, I will have only one opportunity to meet him prior to the scheduled convening of the commission and so my ability to disclose the information to him is extremely limited in any event. I am willing to agree to some degree of limited disclosure temporarily. I believe such terms can be agreed between the Prosecution and myself.

7. I should also note that the limitations in the Protective Orders, as issued, will prevent me from representing Mr. al Qahtani in any meaningful way, will prevent him from having any role in assisting in his own defense, deny him substantially any confrontation and in fact, I believe they constitute a conflict of interest of such severity as to cause me to question my ability to meet my ethical obligations pursuant to the Kentucky Professional Conduct Rules.

LTC Bryan Broyles

-----Original Message-----

From: Hodges, Keith [REDACTED]

Sent: Monday, January 23, 2006 12:03

To: [REDACTED]

Subject: PO 1 F (Trial Order, US v. Al Qahtani)

1. This email Trial Order has been personally directed by the Presiding Officer in the

RE 24 (al Qahtani)
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subject case to prepare the parties for the February Trial term (27 Feb - 3 Mar 06.) It lists the functions that the parties are expected to perform at that trial term. This email and all replies will be added to the PO 1 filings series.

2. Defense only - counsel choice. Advise not later than 26 Jan 2006 whether you believe that you are representing the accused (i.e., the accused has *not* indicated he wishes to proceed pro se, and the accused *has* accepted your representation) and whatever information you have whether a civilian counsel will join the case (and the email address and contact information for that counsel.) This information is necessary not only so the business of the February trial term can be planned, but so the Presiding Officer can know why motions, filings, or other information might not be provided. *Note:* Even if counsel believe that an accused may wish to proceed pro se, or has or will reject the services of counsel, the parties will still prepare themselves to proceed in accordance with this Order.

3. Existing Protective Orders. The parties were directed in PO 1 to provide copies of all existing Protective Orders. None were provided and therefore the Presiding Officer presumes that none exist. If such orders exist, send them immediately. The PO 1 deadline was 5 Jan 2006.

4. Protective Orders.

a. The three attached Protective Orders have been issued pursuant to Commission Law *sua sponte* by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial.

b. Counsel who wish this order modified or rescinded shall follow the Procedures in POM 9-1.

5. Motions on the Discovery Order (PO 2.)

a. Counsel are reminded that in accordance with PO 1, the due date for any motion on the Discovery Order is 31 Jan 2006. Responses and replies will be filed in accordance with POM 4-3.

b. Any motion filed on the Discovery Order will be litigated during the February trial term.

6. Voir dire. If counsel desire to voir dire and/or to challenge the Presiding Officer, this will be accomplished during the February trial term.

a. A mini biography of the Presiding Officer is attached to assist counsel.

b. Counsel are strongly encouraged to submit written question for the Presiding Officer. Such questions will be provided to the APO, Presiding Officer, and opposing counsel not later than 8 Feb 2006 in *Word (not PDF)* so the Presiding Officer can answer the questions in the same electronic file.

7. Setting a trial calendar. Not later than 15 Feb, counsel for both sides will complete the attached "Trial Schedule" filling in the appropriate dates and file it with the APO, Presiding Officer and opposing counsel.

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8. Entry of pleas. The accused will be called upon to enter pleas. (If the accused requests to defer pleas, the Presiding Officer advises he will grant the request.)

9. Motions (other than on the Discovery Order.) Counsel may file motions in accordance with POM 4-3. Such motions a party desires litigated at the February trial term shall be filed not later than 6 Feb 2006. Responses shall be filed not later than 7 days from the filing of the motion. Replies, if desired, shall be filed not later than 3 days from when the response was filed. All filing will be done electronically. Be attentive to the requirements of POM 4-3.

10. Motions other than the Discovery Order and those motions filed in accordance with paragraph 9 above. The parties will be asked if they have motions or other motions if motions were made. (If the parties request to defer motions - except a motion as to the wording, terms, and enforceability of the Discovery Order - the Presiding Officer advises he will grant the request.)

11. Inability to perform functions and unavailability. If there is any reason why counsel cannot perform the functions listed in this Order, such matters will be filed with the APO, Presiding Officer, and opposing counsel not later than 26 Jan clearly indicating the functions that counsel cannot perform and the reasons therefore. It is noted that in an email sent on 19 January 2006 (PO 1 E copy attached,) counsel already have an obligation to advise on their possible non-availability. Paragraph 5 of that email stated:

5. If any counsel in the above listed cases cannot be at GTMO during the February trial/session term, advise the Assistant, and the Presiding Officer and opposing and other counsel on that case, **NLT 1200, EST (Monday) 23 January 2006** with the reasons for the unavailability.

12. Representational issues and unavailability (Defense counsel.) Para 6 of PO 1 E stated:

6. All Defense counsel.

a. The fact that an attorney client relationship has not yet been established, or a client has indicated he wishes to proceed pro se, does not amount to "unavailability," and it may suggest a session in February is paramount. Counsel are encouraged to provide such information, however, as it might be useful in planning sessions.

b. Detailed Defense Counsel will advise if there are any other counsel (military or civilian) who are also detailed, or who may be detailed or may join the case in the future, and who are not on the attached list. If there are other such counsel, advise the Assistant, Presiding Officer, and other counsel on the case and provide email addresses and other contact information.

Attachments to this email Trial Order

1. Three Protective Orders issued by the Presiding Officer
2. Mini-biography of the Presiding Officer
3. Trial schedule form (Significant Dates)

RE 24 (al Qahtani)
Page 6 of 7

4. PO 1 E

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges

Assistant to the Presiding Officers

Military Commission



<<Significant Commission Dates - worksheet - Feb trial term trial Order attachment.doc>> <<CAPT O'Toole Biographical Summary - Voir Dire.pdf>> <<PO 1 E - al Qahtani - Announcement of Feb trial term, 18 Jan 06.pdf>> <<Protective Order 1 - al Qahtani - ID of all witnesses (23 Jan 06).pdf>> <<Protective Order 2 - al Qahtani - ID of investigators (23 Jan 06).pdf>> <<Protective Order 3 - al Qahtani - FOUO and other markings (23 Jan 06).pdf>>

RE 24 (al Qahtani)
Page 7 of 7

1/26/2006

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Friday, January 27, 2006 11:28 AM
To: [REDACTED]

Subject: PO 1 J - US v al Qahtani - DDC request for delay, questions to DDC, DDC response, and PO decision.

1. The Presiding Officer has directed me to inform the parties that:
 - a. The Defense's obligation to respond to the following paragraphs of PO 1 F has been satisfied: 2, 11, and 12.
 - b. The Defense's obligation to file a motion to the Discovery Order - if desired - as directed by PO 2 is stayed until 1 April 2006 unless the stay is sooner vacated.
 - c. The Defense is relieved of its duty to be present for the Trial Term set for 27 February 2006.
 - d. The following Defense obligations are stayed until 1 April 2006 unless the stay is sooner vacated: to submit voir dire questions to the Presiding Officer (if desired,) to file motions as addressed in paragraphs 9 and 10 of PO 1 F, and to perform those other representational functions scheduled for the February Trial Term.
 - d. The Protective Orders previously issued remain in effect.
 - e. Unless otherwise directed, the Prosecution will continue to fulfill its discovery obligations under PO 2.
2. The Defense will advise the Presiding Officer of its progress in this matter, such as travel arrangements and meeting dates, as indicated in paragraph 7 and the enclosure to PO 1 F (including the anticipated date of the first session) in the body of an email. That email shall be provided to the Presiding Officer, the Assistant, and opposing counsel on the following dates: 15 February, 1 March, and 15 March. The subject of the email shall be: PO 1 J - US v. al Qahtani - Defense Status # (X), where X is the date of the status report. In preparing status reports, LTC Broyles will presume for the sole purpose of scheduling that he will be representing the accused. Finally, the status reports will also indicate whether any other defense counsel, civilian or military, are expected to join the defense team.
3. The Defense Status reports will be considered by the Presiding Officer in determining whether the stays issued are facilitating reasonable progress towards achieving an informed decision by the accused regarding his representation by counsel and whether such stays should continue in effect as presently ordered.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
 Assistant to the Presiding Officers
 Military Commission

RE 25 (al Qahanti)
 Page 1 of 5

1/27/2006

[REDACTED]

From: Hodges, Keith [REDACTED]
Sent: Thursday, January 26, 2006 4:24 PM
To: [REDACTED]
Subject: RE: PO 1 J: Defese Request for Continuance in Trial Date

Thank you.

Apparently the Bill Gates spell checker cannot divine intent. Yes, I meant email "thread" and not threat. Thanks for catching it.

Keith Hodges

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Thursday, January 26, 2006 4:21 PM
To: [REDACTED]
Subject: RE: PO 1 J: Defese Request for Continuance in Trial Date

Yes, I deleted question b as inapplicable due to the prior answer.

In the future, I'll leave intact all of the email in reply. This will leave the email threaD intact. I assume you weren't actually threaTening me.

ltc b

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Thursday, January 26, 2006 16:18
To: [REDACTED]
DoD [REDACTED]
Subject: RE: PO 1 J: Defese Request for Continuance in Trial Date

LTC Broyles,

The sole purpose of this email is to seek clarification of your response below. Please reply "on top of" this email to keep the thread intact.

1. In the email sent to you earlier was question b (excised by LTC Broyles according to his email) which read: "b. If you have not met with the accused, was that because he refused or did not want to? If that is not the case, why have you not met with the accused?" I presume you did not answer this question because it was not applicable given your answer to question "a." Is that correct?

RE 25 (al Qahanti)
Page 2 of 5

2. Your first line indicates "I have excised all but the questions you asked, and the answers are as follows." I ask that that not be done in the future because it makes this email threat incomplete.

Thank you.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

From: [REDACTED]
Sent: Thursday, January 26, 2006 3:40 PM
To: [REDACTED]

Subject: RE: PO 1 J: Defese Request for Continuance in Trial Date

CPT O'Toole:

I have excised all but the questions you asked, and the answers are as follows:

a. Have you met with and spoken to the accused?

Yes.

c. Do you believe the accused desires pro se representation? Please indicate any information that you can that gives rise to that belief.

I have no reason to believe the accused seeks to represent himself.

d. Your email indicates you have "contact information" for the family. What is the degree of relationship (how distant a family member or relation) are the family members for which you have contact information?

I have email ostensibly from the accused's brother, and he refers to his mother as a participant in meetings.

e. Have you spoken to or had an exchange of correspondence with any of the family to date? See d above.

f. Have any of the family members to date told you that they support the accused's being represented? The accused's brother contacted an attorney in the U.S. seeking representation for his brother and was directed to me.

RE 25 (al Qahanti)
Page 3 of 5

g. What reason do you have to believe family members would provide that support? Initial contact indicates a desire to ensure adequate representation for the accused, and I have no reason to believe the family will reject as unsatisfactory detailed counsel. Intermediary contacts suggest the family will support detailed counsel. I also provide this quote from an email with the brother to habeas (civilian) counsel: "Finally, we want to tell you that my mother has the key to convince him regarding cooperation with you."

h. In terms of efficiency, have you contacted any of the family members telephonically or by email to determine whether they would be willing to meet with you or provide the support mentioned above? Are they willing to meet with and/or speak with you? The family has expressed a preference to meet in Riyadh to discuss the accused. I have suggested dates to them consistent with the travel requirements of the Army, so approximately 45 days from now.

i. Why is travel to Riyadh necessary (i.e., why would other means of communication not suffice?) First, they have expressed a preference for such a location, and I am in no position to dictate otherwise. I believe I will need to develop a relationship with the family to overcome their well-founded distrust of U.S. Military personnel acting on behalf of their son/brother. I also believe I will be best served speaking to as many members of his family and his associates as possible, such as college professors and friends. I believe it necessary to locate those persons with the most influence on the accused. I intend to obtain documents from the family/friends/associates to present to the accused regarding this matter. This trip will serve the secondary purpose of allowing direct trial preparation and witness interviews, something likely to otherwise necessitate a trip prior to the hearing on the merits in any event.

j. To what date do you request a continuance of the initial session of the Commission? This date should be your best estimate of the time needed to contact family members and thereafter have contact with the accused. I can travel immediately (but for obtaining a passport), and three matters beyond my control direct the delay: DOD procedures for travel to Saudi, an agreement by the accused's brother on an appropriate date to meet and clearance by the facility at Gitmo of documents I will need to provide the accused. I have been advised that the minimum 30 days to obtain travel clearance/visas, etc...for travel to Saudi Arabia is in fact an optimistic minimum, and that 60 days is perhaps more realistic. Contact with the accused after meeting with his family will be accomplished immediately, assuming appropriate country clearances and travel arrangements to Cuba can be obtained. I estimate a need for two days with the accused following the family meetings. I am working on an assumption of 45 days to arrange the travel, 5-7 days in Saudi, and the follow up with the accused, thereby making the most likely delay 60 days from now. As the hearing is scheduled for 27 February, one month from now, I will most likely need a delay until the end of March. Fortunately, this date would become a date certain once travel clearances are obtained.

LTC Broyles

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Thursday, January 26, 2006 9:20 AM
To: [REDACTED]

Subject: RE: PO 1 F (Trial Order, US v. Al Qahtani)

2. **Defense only - counsel choice.** Advise not later than 26 Jan 2006 whether you believe that you are representing the accused (i.e., the accused has *not* indicated he wishes to proceed pro se, and the accused *has* accepted your representation) and whatever information you have whether a civilian counsel will join the case (and the email address and contact information for that counsel.) This information is necessary not only so the business of the February trial term can be planned, but so the Presiding Officer can know why motions,

RE 25 (al Qahanti)

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filings, or other information might not be provided. *Note:* Even if counsel believe that an accused may wish to proceed pro se, or has or will reject the services of counsel, the parties will still prepare themselves to proceed in accordance with this Order.

CAPT O'Toole:

Regarding paragraph 2 above, I advise as follows: I am not representing the accused. There is no civilian counsel on the case. I am attempting to clarify my relationship with Mr. al Qahtani, and as a result of contact information for Mr. al Qahtani's family that I obtained today, I request a continuance in the trial date set above to meet with his family in Riyadh, Saudi Arabia. I am attempting to arrange travel to Riyadh at the earliest possible date, but have been advised that that is a minimum of 30 days from the request for country clearance, which process I am beginning today. This contact is the best opportunity available to change my current status with the accused, Mr. al Qahtani.

LTC Broyles

RE 25 (al Qahanti)
Page 5 of 5

1/27/2006

Hodges, Keith

From: Hodges, Keith [REDACTED] **Sent:** Wed 2/1/2006 3:42 PM
To: Broyles, Bryan, LTC, DoD OGC; [REDACTED]
Cc: [REDACTED]
Subject: PO Decision - Request for Special Relief, US v. Al Qahtani - - Failure of the Government to Comply with Disclosure Obligation
Attachments:

This Presiding Officer directed that I send the following:

LTC Broyles,

1. A special request under Paragraph 12 of POM 4-3 anticipates matters that do not involve questions of law or fact or that do not require lengthy recitation of facts or citations to authority. Examples of proper matters for a special request include an extension of time for filing, to append documents to a previously filed matter, an exception to digitize attachments, or other similar matters.
2. The request contained in your email requires the Presiding Officer to make findings of fact, apply commission law, and to fashion appropriate relief, if warranted. As such, this matter is not one that is readily disposed of as a special request. Any objection or motion related to discovery must be raised as a motion in accordance with POM 4-3.
3. The Presiding Officer views your duty as Detailed Defense counsel as consistent with the making of motions for relief that you consider necessary to enable you to comply with the orders of the Presiding Officer or to properly prepare to represent the accused at such time as you believe that you do represent him.
4. You are encouraged to discuss discovery or other matters with the prosecution to assist you in the performance of your duty as Detailed Defense Counsel, however, the Presiding Officer should not be party to those discussions. See paragraph 4b, POM 7-1. Finally, while counsel are encouraged to engage in a full and frank exchange of information via email on any matter in order to fulfill their respective responsibilities, all counsel are reminded that correspondence, email or other communication should reflect a professional and civil tone, focusing on matters at issue in the case before the commission.
5. Your special request for relief contained in your email dated 1 February 2006 is DENIED as not properly raised.
6. This email and the below emails will be placed in the PO 2 series of the filings inventory for record purposes only.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges

RE 26 (al Qahtani)
Page 1 of 7

Assistant to the Presiding Officers

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]

Sent: Wed 2/1/2006 9:35 AM

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: Request for Special Relief, US v. Al Qahtani - - Failure of the Government to Comply with Disclosure Obligation

In the interest of clarity on this matter:

1. I was on my office phone with the Department of Justice at 1704 on 31 January.
2. COL Sullivan left this office at 1705 on 31 January. At the time he left, I was in the office, still in uniform.
3. LCDR Swift was still in the office when COL Sullivan left the office.
3. After my 1704 telephone call, and after briefly speaking to COL Sullivan as he left, I changed into civilian clothes. I then walked to the garage and left the office, leaving LN1 [REDACTED] and (I believe) LCDR Swift in the office.
4. I left not before 1710, and more likely 1715. I made certain I was in the office and available until 1700, as I had on previous days when the prosecution indicated they were going to serve matters on me (notably, Friday, 27 January). On 31 January, the prosecution had not asked me my schedule, nor asked me to remain to be served documents or I would have remained. I stayed until at least 1700 because I was aware of their deadline.
5. The prosecution attempted to make service on LN1 [REDACTED] but a) did not arrive as they said they would, b) attempted to serve classified documents on him, and c) did not ask [REDACTED] to check on or assure my availability. I discovered this information by asking LN1 [REDACTED] following your email below.
6. OCR of the documents does not work. I attach the following image as relevant on this matter:
<<error.jpg>>
7. I renew my objections to the government's failure to follow the direction of the Presiding Officer.

LTC Broyles

-----Original Message-----

From: [REDACTED]
Sent: Wednesday, February 01, 2006 08:53
To: Broyles, Bryan, LTC, DoD OGC
Cc: [REDACTED]
[REDACTED]

Subject: RE: Request for Special Relief, US v. Al Qahtani - - Failure of the Government to Comply with Disclosure Obligation

Sir,

SSGT Sears, the paralegal assigned to al Qahtani, attempted to deliver the witness list to you yesterday at approximately 1700. The only individual present in your office was LN1 [REDACTED] who was not the proper person to deliver the documents to. The witness list was served to you directly at 0810 on 1 February.

Also, if you use the "Paper Capture" or "OCR" function on Adobe Acrobat, the files are fully searchable.
RE 26 (al Qahtani)
Page 2 of 7

v/r
LT

-----Original Message-----

From: Broyles, Bryan, LTC, DoD OGC
Sent: Wednesday, February 01, 2006 07:40
To: [REDACTED]
Cc: [REDACTED]

Subject: Request for Special Relief, US v. Al Qahtani - - Failure of the Government to Comply with Disclosure Obligation

Sir,

On Monday, 30 January 2006, I was served a white binder containing 26 Compact Discs, contained thereon the purported disclosure of the United States pursuant to your order of 21 December 2005. One additional disc was served on 31 January. Pursuant to that order, the government was required to disclose, not later than 31 January 2006, the following:

- a. Evidence and copies of all information the prosecution intends to offer at trial.
- b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.
- c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a curriculum vitae of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.
- d. Exculpatory evidence known to the prosecution.
- e. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:
 1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.
 2. Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.
 3. Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.
- f. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:
 - (1.) Sworn to, written or signed by, the witness.
 - (2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.
 - (3) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

I have the following objections to the disclosure:

1. The government has made apparently identical disclosure in three cases at the same time (Barhom, al Sharbi and the above styled case). As a result of this decision, I have been served 1100+ documents, many (most) of which will not be introduced in and are not relevant to my case.

RE 26 (al Qahtani)
Page 3 of 7

2. The format of the disclosure prevents meaningful use of the documents. The disclosure of documents are in Adobe .pdf format, but not searchable. Given the "document dump" style of disclosure, this exacerbates the problem. After a quick review (the only type permitted), I have found the first mention of my client on page 609. While I do not dispute that materials can be relevant without mentioning my client, CD number 23 is the first to contain any substantial documentary evidence, and it contains one large, unparsed .pdf file title "General Allegations Documents.pdf with 576 pages. CD number 24 is one large file, title: F3 Discovery 000601 - 000924, containing 324 pages, and the final CD, served today, 31 January 2006, contains an additional 234 pages.

3. The materials are neither indexed, nor arranged alphabetically by subject, nor chronologically. As a result, Agent Summaries which purport to summarize different statements by Jabran Sa'ad Al Qahtani are found more than a hundred pages apart with little to no relevant material in-between.

4. The documents provided have been edited heavily. The names of investigators have been redacted, as have the names of witnesses identified within the documents. Given the overly restrictive protective order imposed unilaterally by the Presiding Officer, such editing of the material can have no valid purpose. Offers to separately list the names are insufficient, and in other cases have proven inaccurate at best. The government has not been ordered to summarize its evidence, but to provide it, in toto, to the defense. I am attaching Bates Stamped pages 923-924 as a representative sample, showing where the names of agents and witnesses were deleted.

5. I have not received a list of witnesses from the government, which was also to be delivered NLT 31 January 2006, and I accept the implied representation of the prosecution that they intend to call no witnesses.

6. As remedy for the prosecution's failure to follow the PO's direction, I ask that the PO restrict the prosecution from introducing any evidence from redacted documents, and that they be forbidden to refer to witness and interrogator/investigator names that have been redacted or to rely on that information. In the alternative, I ask that the Presiding Officer direct the documents be either indexed, or arranged in a logical fashion, and that the documents pertaining only to other cases be removed from the materials provided the detailed counsel. The PO should also direct that unredacted copies of the documents be provided.

<< File: bates923-924.pdf >>

Bryan Broyles

LTC, JA

AL QAHTANI
REVIEW EXHIBIT 26
PAGES 84 AND 85

Review Exhibit (RE) 26, pages 84 and 85 is a Criminal Investigative Task Force (CITF) Report of Investigative Activity, dated Jan. 15, 2004. It consists of the witness interview of Ghassan Abdullah al Sharbi.

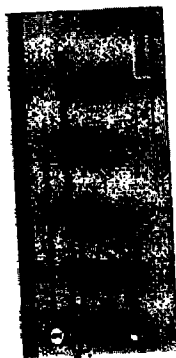
This record has been marked “For Official Use Only/Law Enforcement Sensitive.” As such, Protective Order No. 3, **RE 20** prohibits its release to the public.

RE 26, pages 84 and 85 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 26, pages 84 and 85**.

//signed//

M. Harvey
Chief Clerk of Military Commissions



Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

Hodges, Keith

From: Hodges, Keith [REDACTED] **Sent:** Thu 2/2/2006 10:35 AM
To: Broyles, Bryan, LTC, DoD OGC; [REDACTED]
Cc: [REDACTED]

Subject: PO 2 B: PO Decision - RE: Request for Special Relief, Discovery Violation, US v. Al Qahtani

Attachments: ☐ PO 2 A - al Qahtani - Def Req for Relief on DO and PO decision - 1 Feb 06.pdf(36KB)

Defense:

1. As indicated in the response to your previous request for special relief dated 1 Feb 06 (PO 2 A-attached,) any objection or request for relief related to discovery must be raised in a motion in accordance with POM 4-3.

2. This email will be placed in the filings inventory as PO 2 B for records keeping purposes only.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
 Assistant to the Presiding Officers

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]

Sent: Wed 2/1/2006 3:18 PM

To: [REDACTED]

Cc: [REDACTED]

Subject: Request for Special Relief, Discovery Violation, US v. Al Qahtani

Sir,

The prosecution has provided additional copies of some of the documents previously provided on 30 January with some changes. Specifically, the prosecution has removed the black marks covering the names of CITF agents, but leaving all other edits. While this is certainly a beneficial change, it does not cure the defects as they stand. The offer of the prosecution to, at some point in the indefinite future, provide a separate list of the names of FBI agents (no comment on other names redacted) is unpersuasive as it violates the Discovery Order (these items were due on 31 January) and it still leaves the Defense in the position of relying on prosecution summaries of documents, which is both unacceptable and not contemplated by your order. As your extension of their deadline contemplates only that evidence that needs "declassification", the prosecution is once again in violation of the deadlines set by your order. However, if the names are in fact

RE 27 (al Qahtani)
 Page 1 of 3

"classified", detailed defense counsel withdraws that portion of the objection/request for relief, to the extent that unredacted documents are provided in a timely fashion by the government upon declassification.

A representative sample is attached.

<<bates001228.pdf>>

Bryan Broyles
LTC, JA


AL QAHTANI
REVIEW EXHIBIT 27
PAGE 89

Review Exhibit (RE) 27, page 89 is a Criminal Investigative Task Force (CITF) Report of Investigative Activity, dated Feb. 17, 2003. It consists of the witness interview of Ghassan Abdullah al Sharbi.

This record has been marked “For Official Use Only/Law Enforcement Sensitive.” As such, Protective Order No. 3, **RE 20** prohibits its release to the public.

RE 27, page 89 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 27, page 89**.

//signed//

M. Harvey
Chief Clerk of Military Commissions

⚠ Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

Hodges, Keith

From: Hodges, Keith [REDACTED] **Sent:** Thu 2/2/2006 10:36 AM
To: Broyles, Bryan, LTC, DoD OGC; [REDACTED]
Cc: [REDACTED]
Subject: PO 2 C: PO Decision - RE: Request for Special Relief, US v. Al Qahtani - - Failure of the Prosecution to Comply with PO 2, dated 21 December 205
Attachments: ☐ PO 2 A - al Qahtani - Def Req for Relief on DO and PO decision - 1 Feb 06.pdf(36KB)

Defense:

1. As indicated in the response to your previous request for special relief dated 1 Feb 06 (PO 2 A- attached,) any objection or request for relief related to discovery must be raised in a motion in accordance with POM 4-3.
2. This email will be placed in the filings inventory as PO 2 B for records keeping purposes only.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
 Assistant to the Presiding Officers

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Wed 2/1/2006 8:44 AM
To: [REDACTED]
Cc: [REDACTED]

Subject: Request for Special Relief, US v. Al Qahtani - - Failure of the Prosecution to Comply with PO 2, dated 21 December 205

Sir,

On 1 February 2006, the prosecution served what it purports to be its witness list (attached). The defense objects as follows and requests relief:

1. The list was not timely served.
2. The list does not contain a synopsis of testimony for any of the witnesses as required.
3. The list does not contain contact information on witnesses 1, 3, 5, 8, 10, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 41, 42, 43, 44, 45, and 46.
4. The list is one apparently compiled for multiple cases, without regard for whether the testimony

RE 28 (al Qahtani)
 Page 1 of 8

will be relevant in the above styled case, thereby intentionally requiring the defense to strain the detritus from the list - deliberately swelling the list to 46 witnesses. (Example: "39. Major [REDACTED] USMC, Prosecutor, Office of Military Commissions. (Phone number [REDACTED] [REDACTED] Witness will testify consistent with his sworn statement regarding al Sharbi's admissions when he was served charges.").

5. The list refers to statements that "have been or will be, provided to the defense." The continuing nature of discovery does not relieve the prosecution of its obligation to serve disclosure on the defense consistent with PO 2. Statements that have not been served on defense that are not covered by the Presiding Officer's extension of the discovery deadline for classified matters cannot simply be served later. They are in the government's possession now, presumably, or the individual would not be listed on this alleged witness list.

The defense has previously noted that it was not served a witness list. This list is neither timely, nor does it comport with the order of the Presiding Officer as it is not a list of witnesses the prosecution "intends to call" nor does it contain a synopsis. The defense requests that the government be barred from calling these witnesses at trial.

<<Al Qahtani Witness List.pdf>>

Bryan Broyles
LTC, JA
[REDACTED]

AL QAHTANI
REVIEW EXHIBIT 28
PAGES 92 TO 97

Review Exhibit (RE) 28, pages 92 to 97 is a Prosecution Witness List, dated Jan. 31, 2006. It lists the names of 45 witnesses, a “DoD Interrogator”, and a short synopsis of their probable testimony. Witnesses included on the list are assigned to the FBI, and the military services, as well as other detainees.

This record has been marked “Protected Information” and pertains to the identities of witnesses. As such, Protective Order No. 1, **RE 18** prohibits its release to the public.

RE 28, pages 92 to 97 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 28, pages 92 to 97**.

//signed//

M. Harvey
Chief Clerk of Military Commissions

Hodges, Keith

From: Hodges, Keith [REDACTED] **Sent:** Thu 2/2/2006 10:42 AM
To: Broyles, Bryan, LTC, DoD OGC; Hodges, Keith; [REDACTED]
Cc: [REDACTED]

Subject: RE: PO 2 B: PO Decision - RE: Request for Special Relief, Discovery Violation, US v. Al Qahtani
Attachments:

LTC Broyles,

I have seen that the order in which emails hit this Exchange server email system is sometimes different than the date stamp of when they were sent.

What is MOST important, however, is that the parties must ensure that every motion or request for relief gets an individual answer or it is in the D or P section of the filings inventory as an item for the PO to resolve. (This is why single subject emails are important.)

Keith Hodges

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Thu 2/2/2006 10:36 AM
To: [REDACTED]
Cc: [REDACTED]

Subject: RE: PO 2 B: PO Decision - RE: Request for Special Relief, Discovery Violation, US v. Al Qahtani

Ironically, your email and my email with motion attached flew past each other in the ethos.

lrc b

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Thursday, February 02, 2006 10:35
To: [REDACTED]
Cc: [REDACTED]

Subject: PO 2 B: PO Decision - RE: Request for Special Relief, Discovery Violation, US v. Al Qahtani

RE 29 (al Qahtani)
Page 1 of 4

Defense:

1. As indicated in the response to your previous request for special relief dated 1 Feb 06 (PO 2 A-attached,) any objection or request for relief related to discovery must be raised in a motion in accordance with POM 4-3.
2. This email will be placed in the filings inventory as PO 2 B for records keeping purposes only.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]

Sent: Wed 2/1/2006 3:18 PM

To: [REDACTED]

Cc: [REDACTED]

Subject: Request for Special Relief, Discovery Violation, US v. Al Qahtani

Sir,

The prosecution has provided additional copies of some of the documents previously provided on 30 January with some changes. Specifically, the prosecution has removed the black marks covering the names of CITF agents, but leaving all other edits. While this is certainly a beneficial change, it does not cure the defects as they stand. The offer of the prosecution to, at some point in the indefinite future, provide a separate list of the names of FBI agents (no comment on other names redacted) is unpersuasive as it violates the Discovery Order (these items were due on 31 January) and it still leaves the Defense in the position of relying on prosecution summaries of documents, which is both unacceptable and not contemplated by your order. As your extension of their deadline contemplates only that evidence that needs "declassification", the prosecution is once again in violation of the deadlines set by your order. However, if the names are in fact "classified", detailed defense counsel withdraws that portion of the objection/request for relief, to the extent that unredacted documents are provided in a timely fashion by the government upon declassification.

A representative sample is attached.

<<bates001228.pdf>>

Bryan Broyles
LTC, JA


AL QAHTANI
REVIEW EXHIBIT 29
PAGE 101

Review Exhibit (RE) 29, page 101 is a Criminal Investigative Task Force (CITF) Report of Investigative Activity, dated Feb. 17, 2003. It consists of the witness interview of Ghassan Abdullah al Sharbi.

This record has been marked “For Official Use Only/Law Enforcement Sensitive.” As such, Protective Order No. 3, **RE 20** prohibits its release to the public.

RE 29, page 101 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 29, page 101**.

//signed//

M. Harvey
Chief Clerk of Military Commissions

UNITED STATES OF AMERICA

v.

JABRAN SAID BIN AL QAHTANI

**PROSECUTION MOTION
TO JOIN THE CASES OF U.S v AL
SHARBI, U.S. v AL QAHTANI AND
US v BARHOUMI**

6 FEBRUARY 2006

1. Timeliness- This motion is being filed within the timelines set by the Presiding Officer in his trial order of 23 January 2006 for motions to be considered at the February trial session.
2. Relief Requested- The prosecution asks the Presiding Officer to consolidate the cases of United States v al Sharbi, United States v al Qahtani and United States v Barhoumi into one joint trial before military commission.
3. Facts-
 - a. On 12 December 2005 the Appointing Authority, Mr. John Altenberg, referred charges against Ghassan Abdullah Al Sharbi. On 16 December 2005, Mr. Altenberg referred charges against Sufyan Barhoumi and Jabran Said Bin al Qahtani.
 - b. In his Appointing Orders for the above-named cases, Mr. Altenberg appointed Captain Daniel E. O'Toole, USN, as the Presiding Officer for all three cases, and detailed the same six members (and two alternate members). The referrals are silent on the issue as to whether the cases may be joined for trial.
 - c. Other than the caption and basis for jurisdiction at the top of each individual charge sheet, all three of the above-named accused are charged with identical General Allegations, the identical Conspiracy charge, the same named co-conspirators, and the same overt acts.
 - d. Of particular note, overt acts alleged to have been committed by al Sharbi, al Qahtani and Barhoumi are present on each of the accused's charge sheets in identical sub-paragraphs.
 - e. The three charge sheets allege that al Sharbi, al Qahtani and Barhoumi conspired and joined a criminal enterprise of persons who shared the common criminal purpose of attacking civilians, attacking civilian objects, committing murder by an

unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

- f. As proof of the three above-named accuseds' participation in the conspiracy, the government alleges that al Sharbi and al Qahtani were being trained by Barhoumi in the construction of remote-control detonation devices for use in explosives. The government alleges in its charges that al Sharbi and al Qahtani were to go back to Afghanistan to build, and train others to build, remote-controlled explosive devices to target U.S. Forces.
- g. The government alleges that the three accused were captured together in an al Qaida safe house in Faisalabad, Pakistan on 28 March 2002.
- h. The government intends on presenting physical and documentary evidence seized in the safe house against all three accused, as well as statements made by each of the accused against one another. More simply stated, should the cases not be joined for trial, the government intends to present the exact same case three different times, with the same witnesses, same evidence, and same statements against the three accused.
- i. On 2 February 2006, the Chief Prosecutor requested that the Appointing Authority consolidate the aforementioned cases. On the date of this filing, a decision has not been issued by the Appointing Authority.

4. Discussion- The Presiding Officer has the authority to join cases that could have been properly referred together in the first instance. Military Commission Order No. 1, 31 August 2005, 4(A)(5)(a) states that the Presiding Officer shall rule upon all questions of law. Such a request is a question of law within the province of the Presiding Officer and having such authority is common practice in the federal courts of the United States.

While these commissions are clearly a military function, the nature of the charges and the nature of the al Qaida criminal enterprise clearly indicate that these are not the types of crimes and criminal organizations typically contemplated in courts-martial practice. These types of crimes and organizations are much more akin to federal prosecutions of organized crime families, gangs and other large-scale criminal enterprises. While federal law and procedure is certainly not binding on this commission, following the policies that have developed in the federal courts, that have handled thousands of joint criminal trials, makes for sound military commission jurisprudence, and such authority should be persuasive to this presiding officer.

"There is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials 'play a vital role in the criminal justice system.'" *Zafiro v. United States*, 506 U.S. 534, 537 (1993) citing *Richardson v. Marsh*, 481 U.S. 200, 209 (1987). Joint trials "promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" *Id.* citing *Richardson v. Marsh* at 210. For these reasons, the Supreme Court has repeatedly approved of joint trials. *Id.* citing *Richardson v. Marsh* at 210; *Opper v. United States*, 348 U.S. 84, 95, 99 L. Ed. 101, 75 S. Ct. 158 (1954); *United States v. Marchant*,

25 U.S. 480, 12 Wheat. 480, 6 L. Ed. 700 (1827); cf. 1 C. Wright, Federal Practice and Procedure § 223 (2d ed. 1982) (citing lower court opinions to the same effect).

Historically, American military commissions have often utilized joint trials. The International Military Tribunal at Nuremberg, and many of the subsequent American war crimes commissions that followed after World War II were joint trials. See Kristina D. Rutledge, *Giving the Devil His Due: The Pursuit & Capture of Nazi War Criminals-A Call for Retributive Justice in International Criminal Law*, 3 Regent J. Int'l L. 27, 35-40 (2005). The military commission against the German Saboteurs, held at the Department of Justice in July of 1942,¹ was, also a joint trial. See *Transcript of Proceedings before the Military Commission to Try Persons Charged with Offenses against the Law of War and the Articles of War, Washington D.C., July 8 to July 31, 1942* (http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm). President Roosevelt's order² creating the German Saboteur commission, much like the referrals made by Mr. Altenberg, was also silent on the issue of whether the trial should be held jointly for all accused. Although President Roosevelt's order was one order, as opposed to Mr. Altenberg's three referrals in the above-named cases, it should be of no consequence that President Roosevelt's order to refer the case to trial was done on one sheet of paper, and Mr. Altenberg's referrals on separate pieces of paper, when the charges the Appointing Authority referred are identical and the military commission members the same.

As a point of reference for the Presiding Officer, the three rules that come into play in the federal system when individuals are joined in a criminal trial are FED. R. CRIM. P. 8, 13, and 14. FED. R. CRIM. P. 13, specifically, provides the mechanism by which a judge in federal court can join defendants who have been indicted in separate indictments into one joint trial.

"The Court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information." FED. R. CRIM. P. 13. In essence the prosecution now asks the Presiding Officer to take three cases, whose separate referrals are silent on the issue of whether they may be tried together, and order that the cases be tried together to promote efficiency in the commission process and serve the interests of justice. The issue then, that needs to be considered by the Presiding Officer, is whether these three cases are proper to join together in the first instance. For guidance on this determination, the Presiding Officer could look to FED. R. CRIM. P. 8.

¹ These cases, collectively, resulted in the Supreme Court case of *Ex Parte Quirin, et al.* *Ex Parte Quirin* may be found at 317 U.S. 1 (1942).

² See President Roosevelt's Order of 2 July 1942: "The Military Commission shall meet in Washington, D.C., on July 8th, 1942, or as soon thereafter as is practicable, to try for offenses against the Law of War and the Articles of War, the following persons: Ernest Peter Burger, George John Dasch, Herbert Hans Haupt, Henry Harm Heinck, Edward John Kerling, Hermann Otto Neubauer, Richard Quirin, Werner Thiel."

Defendants may be charged together "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." FED. R. CRIM. P. 8(b). The Rules for Courts-Martial apply an identical standard. *See* R.C.M. 601(e)(3). Clearly, in the charges against al Sharbi, al Qahtani and Barhoumi the government has alleged that the three accused conspired and participated jointly to learn to develop remote-controlled detonation devices for explosives. This clearly constitutes "the same act or transaction" that would have permitted these individuals to be indicted together (and therefore tried together) had they been charged in the federal court system or a court-martial.

The final consideration that the Presiding Officer would then need to address is whether the three accused would be prejudiced by joinder. *See generally* *Zafiro v. United States, supra*. This type of analysis would no doubt fall under the requirement that the Presiding Officer ensure the accused receives a full and fair trial. In this specific instance, and under the current rules for military commissions, there is no prejudice that any of the three accused could suffer if their cases are joined due to the nature of the charges they face.

All eighteen overt acts alleged against each accused are identical. Of the eighteen overt acts that are alleged against the three accused, al Sharbi's name is found in ten of the overt acts, al Qahtani's name is found in nine of the overt acts and Barhoumi's name appears in six of them. Under the offense of Conspiracy found in Military Commission Instruction No. 2, like under all traditional conspiracy law, the government only need prove *one* overt act by *one* of the conspirators or enterprise members. *See* MCI No. 2, C(6). The government is in no way limited to those overt acts only committed by the accused, nor has the government charged al Sharbi, al Qahtani or Barhoumi in that fashion.

Military Commission Order No. 1 6(D)(1) states that "evidence shall be admitted if...the evidence would have probative value to a reasonable person." *See* MCO No. 1 6(D)(1). The government fully intends on presenting evidence of al Sharbi's acts against him, al Qahtani and Barhoumi, his alleged co-conspirators, and vice-versa, in every case, even if the cases are not joined. The Military Commission rules of evidence clearly allow for the introduction of evidence in this manner, and the nature of the charges and the overt acts literally demand it. Presenting identical cases at separate trials is not efficient, wastes government resources, and runs the risk of having inconsistent factual determinations. These reasons alone obviate any potential prejudice the three accused could possibly claim from being joined together for trial in this instance.

All three accused have been identically charged, have received identical discovery to date, have received identical witness lists (which include over forty witnesses), and have been referred to military commission in front of the same Presiding Officer and commission members. Justice demands the cases be consolidated for joint trial before one military commission. The Presiding Officer has the authority to join cases, especially when efficiency and consistency were likely contemplated when the Appointing Authority referred these three cases, with identical charges, to the same Presiding Officer and same members.

5. Table of Authorities.

- a. MCO No. 1 4(A)(5) (a)
- b. MCO No. 1 6(D)(1)
- c. MCI No. 2, C(6)
- d. FED. R. CRIM. P. 8
- e. FED. R. CRIM. P. 13
- f. FED. R. CRIM. P. 14
- g. Zafiro v. United States, 506 U.S. 534, 535 (1993)
- h. R.C.M. 601(e)(3)
- i. Kristina D. Rutledge, *Giving the Devil His Due: The Pursuit & Capture of Nazi War Criminals-A Call for Retributive Justice in International Criminal Law*, 3 Regent J. Int'l L. 27, 35-40 (2005).
- j. President Roosevelt's Military Order of 2 July 1942
- k. Ex Parte Quirin 317 U.S. 1 (1942)

6. Attachments. Chief Prosecutor's request to the Appointing Authority to consolidate cases.

7. Oral Argument. Government requests oral argument on this issue.

8. Witnesses. None



LT, U.S. NAVY
Prosecutor



**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610**

February 2, 2006

MEMORANDUM FOR APPOINTING AUTHORITY FOR MILITARY COMMISSIONS

SUBJECT: Request for Consolidation of Cases: Appointing Order 05-0006; Appointing Order 05-0007; Appointing Order 05-0008

1. In December of 2005, Appointing Orders were signed in the following cases:

- a. *United States v. al Sharbi*
- b. *United States v. Barhoumi*
- c. *United States v. al Qahtani*

All three of the accused listed above are charged with the same crimes arising out of the same criminal conduct. The factual allegations against all three accused are the same, in fact, the charge sheets for all three individuals are identical aside from their caption. All three cases were separately designated to be tried by Military Commissions comprised of the same Presiding Officer and Commission Members.

2. The Prosecution respectfully requests that the Appointing Authority consolidate these cases pursuant to the authority to "issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order (reference (c)) and reference (d); and appoint any other personnel necessary to facilitate military commissions." DoDD 5105.70, *Appointing Authority for Military Commissions*, Feb 10, 2004, para 4.1.1. Since *United States v. al Sharbi* and *United States v. Barhoumi* have been included on the trial term beginning on 27 February 2006, the Prosecution requests that this matter be resolved prior to the initiation of proceedings.

3. As all three cases could have been designated for trial in the same Military Commission and in fact have been referred to the same Presiding Officer and Commission Members, consolidation serves the interests of justice and judicial economy. Because the factual allegations against each accused are identical, separate proceedings would require litigation of the same legal challenges and presentation of the same evidence on three separate occasions. Rather than requiring the same Presiding Officer to make legal rulings and the same Commission Members to make factual determinations in three identical but separate proceedings, one unified proceeding would clearly serve the interest of judicial economy and the interest of justice. While the Prosecution is mindful of the potential logistical challenges that may be involved if all three cases are consolidated, the interests of justice and judicial economy as outlined above clearly outweigh any burden associated with overcoming these logistical challenges.

4. If you have any questions regarding this request or require any further information, please contact me, or the detailed Lead Prosecutor for these cases, LT [REDACTED]





MORRIS D. DAVIS
Colonel, USAF
Chief Prosecutor

cc:

Col Dwight Sullivan, USMCR
LTC Bryan Broyles, USA
CPT Wade N. Faulkner, USA
LT William Kuebler, USN

Encl:

1. Appointing Order 05-0006 (*United States v. al Sharbi*)
2. Appointing Order 05-0007 (*United States v. Barhoumi*)
3. Appointing Order 05-0008 (*United States v. al Qahtani*)
4. Charge Sheet *United States v. al Sharbi*
5. Charge Sheet *United States v. al Qahtani*
6. Charge Sheet *United States v. Barhoumi*

[REDACTED]

Military Commission Case No. 05-0005

UNITED STATES

v.

GHASSAN ABDULLAH AL SHARBI
a/k/a Abdullah al Muslim
a/k/a Abu Muslim

Military Commission Members

Appointing Order No. 05-0006

DEC 12 2005

The following officers are appointed to serve as members and alternate members, respectively, of a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member or alternate member will serve until removed by proper authority.

In the event that one or more of the members, not including the Presiding Officer, is removed by the Appointing Authority, one or more of the alternate members will automatically be appointed, in order, to replace the removed member(s), until either all removed members have been replaced or no alternate members remain. Should the Presiding Officer grant a challenge for cause against any member, that member will be removed as a member, excused from further proceedings, and automatically replaced by the next alternate member. Any alternate member appointed under the automatic replacement provisions herein described shall become a member of the commission and shall be subject to removal and automatic replacement as if originally appointed as a member. In accordance with Paragraph 4(A)(1)&(2) of Military Commission Order No. 1, should no alternate member be available to replace any member I remove or any member removed pursuant to a challenge for cause, and provided that at least three members, in addition to the Presiding Officer, remain, the commission may proceed without appointment of additional members.

Captain Daniel E. O'Toole, USN, Presiding Officer

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USA, Member

Colonel [REDACTED] USA, Member

Captain [REDACTED] USN, Member

Lieutenant Commander [REDACTED] USN, First Alternate Member

Lieutenant Colonel [REDACTED] SMC, Second Alternate Member


John D. Altenburg, Jr.

Appointing Authority for Military Commissions

[REDACTED]

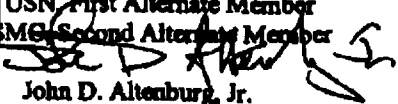
[REDACTED]

Military Commission Case No. 05-0006

UNITED STATES	)	Military Commission Members
)	
v.	)	Appointing Order No. 05-0007
)	
SUFYIAN BARHOUMI)	
a/k/a Abu Obaida)	DEC 16 2005
a/k/a Ubaydah Al Jaza'iri)	
a/k/a Shafiq)	

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Captain Daniel E. O'Toole, USN, Presiding Officer
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USA, Member
Colonel [REDACTED] USA, Member
Captain [REDACTED] USN, Member
Lieutenant Commander [REDACTED] USN, First Alternate Member
Lieutenant Colonel [REDACTED] SMG, Second Alternate Member

John D. Altenburg, Jr.
Appointing Authority for Military Commissions

[REDACTED]

[REDACTED]

Military Commission Case No. 05-0007

UNITED STATES	)	Military Commission Members
)	
v.	)	Appointing Order No. 05-0008
)	
JABRAN SAID BIN AL QAHTANI)	
a/k/a Salam al Farsi)	
a/k/a Hateb)	
a/k/a Jabran al Qahtan	)	DEC 16 2005
a/k/a Saad Wazar Hatib Jabran)	
a/k/a Jabran Saad Wazar Sulayman)	
a/k/a Jabran Wazar)	

The following officers are appointed to serve as members and alternate members, respectively, of a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member or alternate member will serve until removed by proper authority.

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Captain Daniel E. O'Toole, USN, Presiding Officer
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USA, Member
Colonel [REDACTED] USA, Member
Captain [REDACTED] USN, Member
Lieutenant Commander [REDACTED] USN, First Alternate Member
Lieutenant Colonel [REDACTED] USMC, Second Alternate Member


John D. Altenburg, Jr.
Appointing Authority for Military Commissions

FOR OFFICIAL USE ONLY

RE 30 (al Qahtani)
Page 10 of 24

UNITED STATES OF AMERICA

v.

GHASSAN ABDULLAH AL SHARBI
a/k/a Abdullah al Muslim
a/k/a Abu Muslim

)
)
)
)
) CHARGE:
) CONSPIRACY
)

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Ghassan Abdullah al Sharbi (a/k/a/ Abdullah al Muslim a/k/a/ Abu Muslim hereinafter "al Sharbi") is subject to his Military Order of November 13, 2001.
2. The charged conduct alleged against al Sharbi is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In 1992 and 1993, al Qaida supported violent opposition of U.S. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.
9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyan Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:
 - a. In 1998 Barhoumi, an Algerian citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated training camp, where he received training in constructing and dismantling electronically-controlled explosives.
 - b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.

- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bayat* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.
- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.
- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.

- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
 - m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
 - n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
 - o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
 - p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
 - q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.
 - r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.
15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

UNITED STATES OF AMERICA

v.

JABRAN SAID BIN AL QAHTANI

a/k/a Salam al Farsi

a/k/a Hateb

a/k/a Jabran al Qahtan

a/k/a Saad Wazar Hatib Jabran

a/k/a Jabran Saad Wazar Sulayman

a/k/a Jabran Wazar

) CHARGE:

) CONSPIRACY

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Jabran Said Bin al Qahtani (a/k/a/ Salam al Farsi a/k/a Hateb a/k/a Jabran Qahtan a/k/a/ Saad Wazar Hatib Jabran a/k/a/ Jabran Saad Wazar Sulayman a/k/a Jabran Wazar) is subject to his Military Order of November 13, 2001.
2. The charged conduct alleged against al Qahtani is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

8. In 1992 and 1993, al Qaida supported violent opposition of U.S. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.
9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.
10. In February 1998, Usama bin Laden, Ayman al Zawabiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyan Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:
 - a. In 1998 Barhoumi, an Algerian citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated

training camp, where he received training in constructing and dismantling electronically-controlled explosives.

- b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.
- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *baya'at* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.

- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.
- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.
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- m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
- n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
- o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
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- q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.

- r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.
15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

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Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Tuesday, February 07, 2006 4:49 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: D 1 (Inactive Section) - al Qahtani - Motion for Appropriate Relief (Noncompliance with Discovery Order)

1. The Detailed Defense Counsel (DDC) has filed several special requests for relief in lieu of a POM 4-3 motion alleging Prosecution non-compliance with the Discovery Order. Those special requests were not accepted as they were not within the scope of a special request for relief. See PO 2 A, PO 2 B, and PO 2 C.
2. Substantially the same matters that were raised as special requests for relief in PO 2 A through C are now raised in the form of an amicus curiae motion and brief.
3. The privilege to be heard as an amicus curiae rests within the discretion of the Presiding Officer. Generally, such discretion is exercised favorably when amicus curiae status is found to be timely, useful, or otherwise in aid of a matter pending before a court, or in this case, a military commission. At the trial level, where issues of fact as well as law predominate, the aid of an amicus curiae is less appropriate. This is particularly so when addressing case-specific, factual matters, rather than a jurisdictional or other over-arching issue of law. In this case, DDC specifically seeks a finding of noncompliance by the Prosecution with a Discovery Order of the commission and the DDC seeks relief for the alleged noncompliance. The proffered amicus curiae motion, though timely, raises a fact-based issue that is ill-suited to amicus curiae participation. Furthermore, the DDC has been detailed as counsel in this matter and as such he has the standing necessary to compel compliance with discovery through a motion, without need of friend of the court status. The amicus curiae motion is, therefore, not accepted for filing.
4. The defense's amicus curiae motion and brief shall be placed into the inactive section of the filings inventory as D-1, as filed and not accepted for the reasons stated above. Furthermore, the government is not required to respond to the amicus curiae motion, although the government is encouraged to resolve the concerns raised in it. Should the defense desire to raise the government's noncompliance with the Discovery Order of this commission as a matter warranting relief, the defense may file a motion in accordance with POM 4-3 in his capacity as the DDC, but not as an amicus curiae.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

-----Original Message-----

From: Hodges, Keith [mailto:[REDACTED]]
Sent: Monday, February 06, 2006 8:28 AM
To: Broyles, Bryan, LTC, DoD OGC; [REDACTED]

Cc: [REDACTED]

Subject: RE: Motion for Appropriate Relief, US v. Al Qahtani - - Failure of the Government to Comply with Disclosure Obligation

The Presiding Officer is considering whether to place this item on the filings inventory. Until that is done, the Prosecution need not file a response.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

-----Original Message-----

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Thursday, February 02, 2006 10:36 AM
To: [REDACTED]
Cc: [REDACTED]

Subject: Motion for Appropriate Relief, US v. Al Qahtani - - Failure of the Government to Comply with Disclosure Obligation

Sir,

attached you will find the amicus brief requesting relief from the government's violation of your Discovery Order.

The detailed counsel reiterates the position that the Presiding Officer is bereft of authority to act before the commission convenes and without the full body of the commission. To preserve its position on discovery, the detailed counsel submits this amicus motion.

LTC Broyles
Detailed Counsel

-----Original Message-----

From: Hodges, Keith [mailto:[REDACTED]]
Sent: Wednesday, February 01, 2006 15:43
To: [REDACTED]
Cc: [REDACTED]

Subject: PO Decision - Request for Special Relief, US v. Al Qahtani - - Failure of the Government to Comply with Disclosure Obligation

This Presiding Officer directed that I send the following:

LTC Broyles,

- 1. A special request under Paragraph 12 of POM 4-3 anticipates matters that do not involve questions of law or fact or that do not require lengthy recitation of facts or citations to authority. Examples of proper matters for a special request include an extension of time for filing, to append documents to a previously filed matter, an exception to digitize attachments, or other similar matters.**
- 2. The request contained in your email requires the Presiding Officer to make findings of fact, apply commission law, and to fashion appropriate relief, if warranted. As such, this matter is not one that is readily disposed of as a special request. Any objection or motion related to discovery must be raised as a motion in accordance with POM 4-3.**
- 3. The Presiding Officer views your duty as Detailed Defense counsel as consistent with the making of motions for relief that you consider necessary to enable you to comply with the orders of the Presiding Officer or to properly prepare to represent the accused at such time as you believe that you do represent him.**
- 4. You are encouraged to discuss discovery or other matters with the prosecution to assist you in the performance of your duty as Detailed Defense Counsel, however, the Presiding Officer should not be party to those discussions. See paragraph 4b, POM 7-1. Finally, while counsel are encouraged to engage in a full and frank exchange of information via email on any matter in order to fulfill their respective responsibilities, all counsel are reminded that correspondence, email or other communication should reflect a professional and civil tone, focusing on matters at issue in the case before the commission.**
- 5. Your special request for relief contained in your email dated 1 February 2006 is DENIED as not properly raised.**
- 6. This email and the below emails will be placed in the PO 2 series of the filings inventory for record purposes only.**

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges

Assistant to the Presiding Officers

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]

Sent: Wed 2/1/2006 9:35 AM

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: Request for Special Relief, US v. Al Qahtani - - Failure of the Government to Comply with Disclosure Obligation

In the interest of clarity on this matter:

1. I was on my office phone with the Department of Justice at 1704 on 31 January.
2. COL Sullivan left this office at 1705 on 31 January. At the time he left, I was in the office, still in uniform.
3. LCDR Swift was still in the office when COL Sullivan left the office.
3. After my 1704 telephone call, and after briefly speaking to COL Sullivan as he left, I changed into civilian clothes. I then walked to the garage and left the office, leaving LN1 [REDACTED] and (I believe) LCDR Swift in the office.
4. I left not before 1710, and more likely 1715. I made certain I was in the office and available until 1700, as I had on previous days when the prosecution indicated they were going to serve matters on me (notably, Friday, 27 January). On 31 January, the prosecution had not asked me my schedule, nor asked me to remain to be served documents or I would have remained. I stayed until at least 1700 because I was aware of their deadline.
5. The prosecution attempted to make service on LN1 [REDACTED] but a) did not arrive as they said they would, b) attempted to serve classified documents on him, and c) did not ask [REDACTED] to check on or assure my availability.
I discovered this information by asking LN1 [REDACTED] following your email below.
6. OCR of the documents does not work. I attach the following image as relevant on this matter: <<error.jpg>>
7. I renew my objections to the government's failure to follow the direction of the Presiding Officer.

LTC Broyles

-----Original Message-----

From: [REDACTED]

Sent: Wednesday, February 01, 2006 08:53

To: Broyles, Bryan, LTC, DoD OGC

Cc: [REDACTED]

OGC;

Swann, Robert, Mr, DoD OGC; Davis, Morris, COL, DoD OGC

Subject: RE: Request for Special Relief, US v. Al Qahtani

-
- Failure of the Government to Comply with Disclosure Obligation

Sir,
SSGT [REDACTED] the paralegal assigned to al Qahtani, attempted to deliver the witness list to you yesterday at approximately 1700. The only individual present in your office was LN1 [REDACTED] who was not the proper person to deliver the documents to. The witness list was served to you directly at 0810 on 1 February.

Also, if you use the "Paper Capture" or "OCR" function on Adobe Acrobat, the files are fully searchable.

v/r

LT [REDACTED]

-----Original Message-----

From: Broyles, Bryan, LTC, DoD OGC

Sent: Wednesday, February 01, 2006 07:40

To: [REDACTED]

Cc: [REDACTED]

Davis,

Morris, COL, DoD OGC; [REDACTED]

Subject: Request for Special Relief, US v. Al

Qahtani

-- Failure of the Government to Comply with Disclosure Obligation

Sir,

On Monday, 30 January 2006, I was served a white binder containing 26 Compact Discs, contained thereon the purported disclosure of the United States pursuant to your order of 21 December 2005. One additional disc was served on 31 January. Pursuant to that order, the government was required to disclose, not later than 31 January 2006, the following:

a. Evidence and copies of all information the prosecution intends to offer at trial.

b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a curriculum vitae of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Exculpatory evidence known to the prosecution.

e. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

2. Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.

3. Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.

f. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

I have the following objections to the disclosure:

1. The government has made apparently identical disclosure in three cases at the same time (Barhomi, al Sharbi and the above styled case). As a result of this decision, I have been served 1100+ documents, many (most) of which will not be introduced in and are not relevant to my case.

2. The format of the disclosure prevents meaningful use of the documents. The disclosure of documents are in Adobe .pdf format, but not searchable. Given the "document dump" style of disclosure, this exacerbates the problem. After a quick review (the only type permitted), I have found the first mention of my client on page 609.

While I do not dispute that materials can be relevant without mentioning my client, CD number 23 is the first to contain any substantial documentary evidence, and it contains one large, unparsed .pdf file title "General Allegations Documents.pdf with 576

pages. CD number 24 is one large file, title: F3 Discovery 000601 - 000924, containing 324 pages, and the final CD, served today, 31 January 2006, contains an additional 234 pages.

3. The materials are neither indexed, nor arranged alphabetically by subject, nor chronologically. As a result, Agent Summaries which purport to summarize different statements by Jabran Sa'ad Al Qahtani are found more than a hundred pages apart with little to no relevant material in-between.

4. The documents provided have been edited heavily.

The names of investigators have been redacted, as have the names of witnesses identified within the documents. Given the overly restrictive protective order imposed unilaterally by the Presiding Officer, such editing of the material can have no valid purpose. Offers to separately list the names are insufficient, and in other cases have proven inaccurate at best. The government has not been ordered to summarize its evidence, but to provide it, in toto, to the defense. I am attaching Bates Stamped pages 923-924 as a representative sample, showing where the names of agents and witnesses were deleted.

5. I have not received a list of witnesses from the government, which was also to be delivered NLT 31 January 2006, and I accept the implied representation of the prosecution that they intend to call no

witnesses.

6. As remedy for the prosecution's failure to follow the PO's direction, I ask that the PO restrict the prosecution from introducing any evidence from redacted documents, and that they be forbidden to refer to witness and interrogator/investigator names that have been redacted or to rely on that information. In the alternative, I ask that the Presiding Officer direct the documents be either indexed, or arranged in a logical fashion, and that the documents pertaining only to other cases be removed from the materials provided the detailed counsel. The PO should also direct that unredacted copies of the documents be provided.

<< File: bates923-924.pdf >>

Bryan Broyles

LTC, JA



Hodges, Keith

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Thursday, February 02, 2006 10:36 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: Motion for Appropriate Relief, US v. Al Qahtani - - Failure of the Government to Comply with Disclosure Obligation
Attachments: Al Qahtani Witness List.pdf; bates001228.pdf; bates923-924.pdf; discoverymotion.doc



Al Qahtani Witness
List.pdf (9...



bates001228.pdf
(43 KB)



bates923-924.pdf
(53 KB)



discoverymotion.do
c (46 KB)

Sir,

attached you will find the amicus brief requesting relief from the government's violation of your Discovery Order.

The detailed counsel reiterates the position that the Presiding Officer is bereft of authority to act before the commission convenes and without the full body of the commission. To preserve its position on discovery, the detailed counsel submits this amicus motion.

LTC Broyles
Detailed Counsel

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Wednesday, February 01, 2006 15:43
To: [REDACTED]
Cc: [REDACTED]

Subject: PO Decision - Request for Special Relief, US v. Al Qahtani - - Failure of the Government to Comply with Disclosure Obligation

This Presiding Officer directed that I send the following:

LTC Broyles,

1. A special request under Paragraph 12 of POM 4-3 anticipates matters that do not involve questions of law or fact or that do not require lengthy recitation of facts or citations to authority. Examples of proper matters for a special request include an extension of time for filing, to append documents to a previously filed matter, an exception to digitize attachments, or other similar matters.

2. The request contained in your email requires the Presiding Officer to make findings of fact, apply commission law, and to fashion appropriate relief, if warranted. As such, this matter is not one that is readily disposed of as a special request. Any objection or motion related to discovery must be raised as a motion in accordance with POM 4-3.

3. The Presiding Officer views your duty as Detailed Defense counsel as consistent with the making of motions for relief that you consider necessary to enable you to comply with the orders of the Presiding Officer or to properly prepare to represent the accused at such time as you believe that you do represent him.

4. You are encouraged to discuss discovery or other matters with the prosecution to assist you in the performance of your duty as Detailed Defense Counsel, however, the Presiding Officer should not be party to those discussions. See paragraph 4b, POM 7-1. Finally, while counsel are encouraged to engage in a full and frank exchange of information via email on any matter in order to fulfill their respective responsibilities, all counsel are reminded that correspondence, email or other communication should reflect a professional and civil tone, focusing on matters at issue in the case before the commission.

5. Your special request for relief contained in your email dated 1 February 2006 is DENIED as not properly raised.

6. This email and the below emails will be placed in the PO 2 series of the filings inventory for record purposes only.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges

Assistant to the Presiding Officers

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]

Sent: Wed 2/1/2006 9:35 AM

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: Request for Special Relief, US v. Al Qahtani - - Failure of the Government to Comply with Disclosure Obligation

In the interest of clarity on this matter:

1. I was on my office phone with the Department of Justice at 1704 on 31 January.
2. COL Sullivan left this office at 1705 on 31 January. At the time he left, I was in the office, still in uniform.
3. LCDR Swift was still in the office when COL Sullivan left the office.
3. After my 1704 telephone call, and after briefly speaking to COL Sullivan as he left, I changed into civilian clothes. I then walked to the garage and left the office, leaving LNI [REDACTED] and (I believe) LCDR Swift in the office.
4. I left not before 1710, and more likely 1715. I made certain I was in the office and available until 1700, as I had on previous days when the prosecution indicated they were going to serve matters on me (notably, Friday, 27 January). On 31 January, the prosecution had not asked me my schedule, nor asked me to remain to be served documents or I would have remained. I stayed until at least 1700 because I was aware of their deadline.
5. The prosecution attempted to make service on [REDACTED] but a) did not arrive as they said they would, b) attempted to serve classified documents on him, and c) did not ask [REDACTED] to check on or assure my availability. I discovered this information by asking [REDACTED] following your email below.
6. OCR of the documents does not work. I attach the following image as relevant on this matter: <<error.jpg>>
7. I renew my objections to the government's failure to follow the direction of the Presiding Officer.

LTC Broyles

-----Original Message-----

From: [REDACTED]

Sent: Wednesday, February 01, 2006 08:53

To: Broyles, Bryan, LTC, DoD OGC

Cc: [REDACTED]

Subject: RE: Request for Special Relief, US v. Al Qahtani -

- Failure of the Government to Comply with Disclosure Obligation

Sir,

SSGT [REDACTED] the paralegal assigned to al Qahtani, attempted to deliver the witness list to you yesterday at approximately 1700. The only individual present in your office was LN1 [REDACTED], who was not the proper person to deliver the documents to. The witness list was served to you directly at 0810 on 1 February.

Also, if you use the "Paper Capture" or "OCR" function on Adobe Acrobat, the files are fully searchable.

v/r

LT [REDACTED]

-----Original Message-----

From: Broyles, Bryan, LTC, DoD OGC

Sent: Wednesday, February 01, 2006 07:40

To: [REDACTED]

Cc: [REDACTED]

Subject: Request for Special Relief, US v. Al Qahtani

- - Failure of the Government to Comply with Disclosure Obligation

Sir,

On Monday, 30 January 2006, I was served a white binder containing 26 Compact Discs, contained thereon the purported disclosure of the United States pursuant to your order of 21 December 2005. One additional disc was served on 31 January. Pursuant to that order, the government was required to disclose, not later than 31 January 2006, the following:

a. Evidence and copies of all information the prosecution intends to offer at trial.

b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a curriculum vitae of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Exculpatory evidence known to the prosecution.

e. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

2. Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.

3. Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.

f. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

I have the following objections to the disclosure:

1. The government has made apparently identical disclosure in three cases at the same time (Barhomi, al Sharbi and the above styled case). As a result of this decision, I have been served 1100+ documents, many (most) of which will not be introduced in and are not relevant to my case.

2. The format of the disclosure prevents meaningful use of the documents. The disclosure of documents are in Adobe .pdf format, but not searchable. Given the "document dump" style of disclosure, this exacerbates the problem. After a quick review (the only type permitted), I have found the first mention of my client on page 609. While I do not dispute that materials can be relevant without mentioning my client, CD number 23 is the first to contain any substantial documentary evidence, and it contains one large, unparsed .pdf file title "General Allegations Documents.pdf with 576 pages. CD number 24 is one large file, title: F3 Discovery 000601 - 000924, containing 324 pages, and the final CD, served today, 31 January 2006, contains an additional 234 pages.

3. The materials are neither indexed, nor arranged alphabetically by subject, nor chronologically. As a result, Agent Summaries which purport to summarize different statements by Jabran Sa'ad Al Qahtani are found more than a hundred pages apart with little to no relevant material in-between.

4. The documents provided have been edited heavily. The names of investigators have been redacted, as have the names of witnesses identified within the documents. Given the overly restrictive protective order imposed unilaterally by the Presiding Officer, such editing of the material can have no valid purpose. Offers to separately list the names are insufficient, and in other cases have proven inaccurate at best. The government has not been ordered to summarize its evidence, but to provide it, in toto, to the defense. I am attaching Bates Stamped pages 923-924 as a representative sample, showing where the names of agents and witnesses were deleted.


5. I have not received a list of witnesses from the government, which was also to be delivered NLT 31 January 2006, and I accept the implied representation of the prosecution that they intend to call no witnesses.

6. As remedy for the prosecution's failure to follow the PO's direction, I ask that the PO restrict the prosecution from introducing any evidence from redacted documents, and that they be forbidden to refer to witness and interrogator/investigator names that have been redacted or to rely on that information. In the alternative, I ask that the Presiding Officer direct the documents be either indexed, or arranged in a logical fashion, and that the documents pertaining only to other cases be removed from the materials provided the detailed counsel. The PO should also direct that unredacted copies of the documents be provided.

<< File: bates923-924.pdf >>

Bryan Broyles

LTC, JA



UNITED STATES OF AMERICA

v.

JABRAN SA'AD AL QAHTANI

)
)
) **AMICUS CURAE MOTION FOR**
) **APPROPRIAT RELIEF FOR**
) **VIOLATION OF PRESIDING**
) **OFFICER ORDER 2**

)
)
) **2 February 2006**
)

Detailed defense counsel in the case of the *United States v. Jabran Sa'ad Al Qahtani* requests that the military commission dismiss the charge, or grant other appropriate relief and states in support of this request:

1. **Synopsis:** The government has failed to comply with the Discovery Order in this case.

2. **Facts:**

a. On Monday, 30 January 2006, the government served on detailed defense counsel a white binder containing 26 Compact Discs, contained thereon the purported disclosure of the United States pursuant to your order of 21 December 2005. One additional disc was served on 31 January, and yet another on 1 February. The government served a document titled *Al Qahtani Witness List.pdf* on a compact disc on 1 February.

b. The documents disclosed contain numerous edits, primarily redacting the names of investigators, but also redacting the names of other detainees or witnesses.

c. The documents and other material disclosed is identical to that disclosed in other cases.

d. Many documents and other materials are not facially relevant or material to the above styled case, and appear to be present only due to paragraph c. above.

e. The documents are not indexed or organized in any manner, nor are they in a searchable format or a format amenable to conversion to a searchable format. In total, more than fifteen hundred pages of documents have been disclosed.

f. Pursuant to your Discovery Order issued on 21 December 2005, the government was required to disclose to the detailed defense counsel not later than 31 January 2006:

1. Evidence and copies of all information the prosecution intends to offer at trial.
2. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony

3. **Discussion:**

a. The government has failed to comply with paragraph 10 of the discovery order, to wit: "Each of the disclosure requirements of this Order shall be interpreted as a requirement to provide to opposing counsel a duplicate of the original of any matter to be disclosed." The government has selectively edited non-classified information from the documents disclosed by redacting names of witnesses, interrogators and investigators. The government offer to provide separately (and well after the discovery deadline) a list of those redacted names, ostensibly identifying which statements they are associated with, is unacceptable. Detailed defense counsel does not believe that relying upon the good graces of the government to provide such

information is either prudent or efficient, in light of their obligation to provide actual copies of the documents. Given the extremely restrictive nature of the Protective Orders in this case, the editing can serve no legitimate purpose.

b. The government, by choosing to provide identical disclosure in multiple cases has revealed its intent to “dump” documents on detailed counsel that are of dubious relation to the above styled case. Such an action can be for no other purpose than to hinder preparation of the defense. Combined with their failure to index or organize the materials in any way, the direct and obvious impact is to protract the review process of detailed counsel.

c. The government failed to timely serve their witness list on detailed counsel. The government did not attempt to serve detailed counsel in a timely fashion, nor make any arrangements to serve counsel until after the deadline had passed.

d. Contact information for witnesses 1, 3, 5, 8, 10, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 41, 42, 43, 44, 45, and 46 was not provided. In lieu of contact information, the government has either provided no information, or provided only a third party through whom the defense can contact the witness, or has placed themselves as the arbiter of contact with the witness. Detailed defense counsel does not intend to seek the permission of the government, the FBI, or any other investigative agency before interviewing witnesses, nor does detailed counsel intend to alert the government as to what witnesses’ our attention is directed, nor is such required.

e. No synopsis for any witness was provided. “‘Synopsis of a witness’ testimony’ is that which the requesting counsel has a good faith basis to believe the witness will say, if called to testify. A synopsis shall be prepared as though the witness were speaking (first person), and shall be sufficiently detailed as to demonstrates both the testimony’s relevance and that the witness has personal knowledge of the matter offered.” Discovery Order, PO 2, paragraph 12c. “Moreover, the requirement of RCM 703(c)(2)(B)(i) for a synopsis of expected testimony is not satisfied by merely listing subjects to be addressed; rather, it must set out what the witness is expected to say about those subjects.” United States v. Rockwood, 52 M.J. 98, 105 (CAAF 1999). The government has made no good faith effort to comply with this requirement, instead listing the general subject matter of the expected testimony in some instances, and in others stating, “Witness will testify consistent with the statements this agent was present for that have been, or will be, provided to the defense.” As the government has not seen fit to provide ANY such statements, this statement is a nullity.

f. Regarding disclosure, the refusal of the government to provide copies of documents as directed is a deliberate choice. The Presiding Officer granted, without objection from detailed counsel, an extension of deadlines to allow the government to provide documents that were being “declassified”. Despite having the accused in custody for almost four years, the government was unready to meet its disclosure obligations. Even running from the date the President found Al Qahtani subject to his military order, the government has had more than eighteen months to prepare for this case. At its latest, beginning from the date the charges were approved, the government has had three months to prepare, and they still missed their deadline.

g. The government has chosen to ignore the direction of the Presiding Officer in providing its witness list. While missing the prescribed deadline may have been simply the result of negligence, the contents of that list appear to reflect a conscious decision to disobey the explicit direction of the Presiding Officer. Combined with the failure to disclose required information, and the failure to synopsise any testimony, the list as provided is useless and the contents or lack thereof appears to be a reasoned and deliberate decision.

h. By waiting until the deadline date, the government has deliberately chosen to limit, so far as is possible, the time in which the defense can prepare. Additionally, by waiting until the last minute (or just after), the government has set in motion events whereby any correction they make to their violations will of necessity occur after the deadlines for their compliance have passed.

i. "A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. *If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony.* There may be cases in which a defendant has legitimate objections to disclosing the identity of a potential witness. Such objections, however, should be raised in advance of trial in response to the discovery request and, if the parties are unable to agree on a resolution, presented to the court. Under the Federal Rules of Criminal Procedure and under the rules adopted by most States, a party may request a protective order if he or she has just cause for objecting to a discovery request. In this case, there is no issue concerning the validity of the discovery requirement or petitioner's duty to comply with it. There is also no indication that petitioner ever objected to the prosecution's discovery request. The simplicity of compliance with the discovery rule is also relevant. As we have noted, the Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant. Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial. The burden of identifying them in advance of trial adds little to these routine demands of trial preparation." Taylor v. Illinois, 484 U.S. 400, 415-16 (1988) (citations omitted, emphasis added).

4. **Evidence:** Al Qahtani Witness List.pdf; bates00128.pdf; bates924-924.pdf.

5. **Relief Requested:** The defense requests that the charge be dismissed. The apparently deliberate nature of the government's failures dictates that no other remedy is appropriate.

6. Detailed counsel requests oral argument on this motion.

By: _____

Bryan T. Broyles

Lieutenant Colonel, U.S. Army

Detailed Defense Counsel

AL QAHTANI
REVIEW EXHIBIT 31
PAGES 142 TO 147

Review Exhibit (RE) 31, pages 142 to 147 is a Prosecution Witness List, dated Jan. 31, 2006. It lists the names of 45 witnesses, a “DoD Interrogator”, and a short synopsis of their probable testimony. Witnesses included on the list are assigned to the FBI, and the military services, as well as other detainees.

This record has been marked “Protected Information” and pertains to the identities of witnesses. As such, Protective Order No. 1, **RE 18** prohibits its release to the public.

RE 31, pages 142 to 147 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 31, pages 142 to 147**.

//signed//

M. Harvey
Chief Clerk of Military Commissions

AL QAHTANI
REVIEW EXHIBIT 31
PAGES 148 TO 150

Review Exhibit (RE) 31, pages 148 to 150 is two Criminal Investigative Task Force (CITF) Report of Investigative Activity, dated Jan. 15, 2004 (pages 148 and 149) and Feb. 17, 2003 (page 150). It consists of two witness interviews of Ghassan Abdullah al Sharbi.

This record has been marked “For Official Use Only/Law Enforcement Sensitive.” As such, Protective Order No. 3, **RE 20** prohibits its release to the public.

RE 31, pages 148 to 150 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 31, pages 148 to 150**.

//signed//

M. Harvey
Chief Clerk of Military Commissions

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Thursday, February 09, 2006 4:25 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: D 1 (Inactive Section) - al Qahtani - Motion for Appropriate Relief (Noncompliance with Discovery Order)
Attachments: Reply to LTC Broyles RE D-1.doc



Reply to LTC
Broyles RE D-1.doc...

The Presiding Officer directed me to send the attached note to the parties.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

-----Original Message-----

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Thursday, February 09, 2006 11:10 AM
To: [REDACTED]
Cc: [REDACTED]

Subject: RE: D 1 (Inactive Section) - al Qahtani - Motion for Appropriate Relief (Noncompliance with Discovery Order)

Sir,

The Order of Mr. Hodges, seen below, relieves the Prosecution of its obligation to comply with any of your orders as it robs detailed counsel of the one method available of raising objections to the Presiding Officer. I have attempted to comply, in so far as I am legally able, with the direction of the Presiding Officer, but the substance of the complaint has been rejected out of hand due to a disagreement in the captioning of the motion.

I request an 8-5 session to discuss this matter, matters related to the Protective Orders and other logistical matters as soon as possible. I will be in the office today, and then I will return to the office on Monday.

LTC Broyles

-----Original Message-----

1. I am concerned that LTC Broyles' email below appears to mischaracterize the Order of the Presiding Officer as the "order of Mr. Hodges." So as to prevent any future misunderstanding on his part, or mischaracterization of my orders, please refer him to review POM 2-2 which lists the authority and duties of the APO. Those duties do not include issuing orders under your own authority. Please also remind him that any order promulgated through the APO, such as the one below, bears the explicit reference that the order is promulgated by the direction of the Presiding Officer. All such orders are, therefore, orders of the Presiding Officer, and they are not orders "of Mr. Hodges."
2. In addition, LTC Broyles' email puts forth an argument that my order relieves the prosecution of the obligation to comply with discovery. It does not. So that there will be no misunderstanding: The prosecution is not relieved of any obligation to comply with the orders of the commission. The prosecution has a continuing obligation to comply with all orders of the Presiding Officer until properly relieved of those obligations by the Presiding Officer or other lawful authority.
3. It is also a matter of concern that LTC Broyles' has characterized his amicus curiae motion as having been "rejected out of hand due to a disagreement in the captioning." It was considered by me and my order explicitly set forth the basis for my declining to accept it. My disposition did not turn on the caption, but on the substantive basis set forth in my order.
4. Finally, the record shows that LTC Broyles is the detailed defense counsel. I am not aware that he has filed a motion to withdraw or otherwise presented an ethical or legal disability for adjudication by proper authority. He, therefore, remains as detailed counsel and would appear to have the standing necessary to file a motion for relief from discovery or from noncompliance with discovery by the prosecution. POM 4-3 describes how to file a discovery motion in such a manner as to preserve objections or other issues for later disposition, if he believes that is necessary.
5. Please reiterate that any relief desired from discovery requirements or from the noncompliance of the prosecution must be submitted in the form of a motion in compliance with POM 4-3.
6. I am willing to meet with counsel in an MCO # 1, 8-5 session, if counsel have exhausted their own resources and believe that such a conference would assist them in discharging their duties. Since I have not yet met counsel on either side, I would prefer the first 8-5 conference be conducted in person and not telephonically. My clear preference is to do so in GTMO during the February trial term. If that is not possible, please have counsel advise me via email why that is not possible, and coordinate directly with each other to propose to me via email two alternative dates, times, and locations for any desired meeting. My office is in Norfolk, VA, but Washington, D.C., might also be convenient, depending on what date is proposed.
7. You may provide this note directly to counsel.

Significant Commission Dates

United States v. al Qahtani

Highlighting signifies modifications from the "worksheet" provided with PO 1.

# ¹	Event	Date	Notes
1.	First session (without members) <ul style="list-style-type: none"> • Convening the Commission • Choice of counsel • Voir dire of PO • Pleas (ordinarily reserved) • Motions (ordinarily reserved) • Discovery Order litigation 	27 Feb – 3 Mar 06	
2.	Provide copies of existing Protective Orders to PO	5 Jan 06 (Past due)	
3.	Submit Protective Orders for PO signature.		POM 9-1
4.	Discovery – Prosecution ²	xxx	
5.	Discovery – Defense ²	xxx	
6.	Requests for access to evidence	20 Mar 06	POM 7-1
7.	"Law" Motions: <i>Motion</i> ³	23 Mar 06 (Please see Note)	POM 4-3 Assumes that either all necessary coordination to permit completion of discovery has been accomplished or assumes that "Law" motions requiring completion of discovery will be reserved
8.	"Law" Motions: <i>Response</i>	Per POM or PO	POM 4-3
9.	"Law" Motions: <i>Reply</i>	Per POM or PO	POM 4-3
10.	Witness requests on law motions	5 Apr 06	POM 10-2
11.	Evidentiary motions: <i>Motion</i>	20 Apr 06 (Please see Note)	POM 4-3 Assumes that either all necessary coordination to permit completion of discovery has been accomplished or assumes that "Evidentiary" motions requiring completion of discovery will be reserved
12.	Evidentiary motions: <i>Response</i>	Per POM or PO	POM 4-3
13.	Evidentiary motions: <i>Reply</i>	Per POM or PO	POM 4-3
14.	Witness requests on evidentiary motions	3 May 06	POM 10-2
15.	Voir dire of members	11 Jul 06	Please see note attached to

¹ The requested dates do not have to be in the chronological order that they appear on this list. For example, counsel may request an earlier date for item 15 than they would for item 7.

² Discovery dates will be included in the discovery order.

³ A "law motion" is any motions except that to suppress evidence or address another evidentiary matter.

			bottom of form placed there on account of space
16.	Prosecution case in chief - <i>Merits</i>	13 Jul 06 Estimate 11 days	Also indicate # of days to present
17.	Defense case in chief - <i>Merits</i>		Also indicate # of days to present
18.	Prosecution – <i>Sentencing</i>	Within 1-2 days of completion of findings Estimate 2 days	Also indicate # of days to present
19.	Defense - <i>Sentencing</i>		Also indicate # of days to present
20.	Witness requests – merits and sentencing	1 Jun 06	POM 10-2
21.	Directed briefs ⁴	xxx	
22.	Requests to take conclusive notice	5 Jun 06	POM 6-2

The Prosecution has proposed identical dates for the cases of the *United States v al Qahtani*, *United States v. Barhoumi* and *United States v al Sharbi* pursuant to its desire to have all three cases consolidated for trial. However, in the event that the Prosecution's request to consolidate the cases sent to the Presiding Officer is denied, the Prosecution still intends to try these three accused on the same dates in consecutive fashion. This Prosecution determination was made in order to save time, money and other governmental resources by not requiring the same participants (of which there are many) to travel for the same testimony three separate times.

⁴ Dates will be established in the directed brief if directed briefs are used.

Hodges, Keith

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Friday, February 17, 2006 4:10 PM
To: [REDACTED]
Cc: 'Hodges, Keith'; [REDACTED]
Subject: PO 1 J - US v. al Qahtani - Defense Status # 15 Feb 2006

Sir,

Status on Representation:

Prior meetings with Mr. Al Qahtani occurred at Guantanamo Bay on 6 Feb 06 and 12 Dec 05.
Travel arrangements: Flight to Saudi scheduled for 20 March, return flight 28 March - country clearance still pending.

Pursuant to paragraph 2, I am listing the Trial Schedule dates in the body of the email:

Proposed First Session: 10-12 April 2006 - for arraignment, choice of counsel, voir dire of the PO. I anticipate requesting to reserve pleas and motions absent specific direction from the accused to the contrary.

Other dates related to the Trial Schedule: Request a delay until the initial session to submit the additional dates. As yet, I do not have either the full unclassified disclosure of the government and none of the classified disclosure (their deadline is not until the end of this month). This will also allow me to either consult with the accused or adjust fire based on an order to represent the accused over his wishes.

Bryan Broyles
LTC, JA
[REDACTED]

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Friday, February 17, 2006 2:31 PM
To: Broyles, Bryan, LTC, DoD OGC
Cc: [REDACTED]

Subject: RE: PO 1 F (Trial Order, US v. Al Qahtani)

LTC Broyles, the Presiding Officer has directed the following reply.

1. The Presiding Officer directs you to comply with the explicit requirement to submit a trial calendar. You are to assume that you will be representing the accused in preparing that calendar.
2. In addition, paragraph 4 required a status report on 15 Feb. The Presiding Officer directs that you submit it by close of business today, or request permission to delay that submission with a justification.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Friday, February 17, 2006 7:57 AM
To: 'Hodges, Keith'
Subject: RE: PO 1 F (Trial Order, US v. Al Qahtani)

Mr. Hodges:

No, I took paragraph 1.d. of the referenced email as suspending the deadline for the Trial Schedule, and don't believe that a request for delay is necessary. The government's trial schedule doesn't take into account that I am not going to be at the "trial term" though I'll be on the island for 8-5 purposes.

Itc b

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Thursday, February 16, 2006 13:13
To: Broyles, Bryan, LTC, DoD OGC
Subject: RE: PO 1 F (Trial Order, US v. Al Qahtani)

LTC Broyles,

RE 34 (al Qahtani)
Page 2 of 6

2/17/2006

Do you request a delay to file anything - specifically for anything for which a delay was not specifically granted? If so, please identify the item and to what date you request an extension.

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Wednesday, February 15, 2006 4:36 PM
To: [REDACTED]
Cc: [REDACTED]
OGC
Subject: RE: PO 1 F (Trial Order, US v. Al Qahtani)

Sir,

Pursuant to "PO 1 - J, US v. Al Qahtani - DDC request for delay, questions to DDC, DDC response, and PO decision", dated Friday, 27 Jan 06, the DDC believes that it is relieved of the obligation to file the proposed trial schedule until 1 April 2006. With that understanding, the DDC also believed that the prosecution's obligation would or should be similarly delayed, however, that was not explicitly set forth in the above email.

LTC Broyles

-----Original Message-----

From: [REDACTED]
Sent: Wednesday, February 15, 2006 16:24
To: [REDACTED]
Subject: RE: PO 1 F (Trial Order, US v. Al Qahtani)

Mr. Hodges,

In accordance with para 7 of the Trial Order please find the Prosecution's proposed "Trial Schedule."

V/R

Capt [REDACTED]

-----Original Message-----

RE 34 (al Qahtani)
Page 3 of 6

2/17/2006

From: Hodges, Keith [REDACTED]
Sent: Monday, January 23, 2006 12:03
To: [REDACTED]

Subject: PO 1 F (Trial Order, US v. Al Qahtani)

1. This email Trial Order has been personally directed by the Presiding Officer in the subject case to prepare the parties for the February Trial term (27 Feb - 3 Mar 06.) It lists the functions that the parties are expected to perform at that trial term. This email and all replies will be added to the PO 1 filings series.

2. **Defense only - counsel choice.** Advise not later than 26 Jan 2006 whether you believe that you are representing the accused (i.e., the accused has *not* indicated he wishes to proceed pro se, and the accused *has* accepted your representation) and whatever information you have whether a civilian counsel will join the case (and the email address and contact information for that counsel.) This information is necessary not only so the business of the February trial term can be planned, but so the Presiding Officer can know why motions, filings, or other information might not be provided. *Note:* Even if counsel believe that an accused may wish to proceed pro se, or has or will reject the services of counsel, the parties will still prepare themselves to proceed in accordance with this Order.

3. **Existing Protective Orders.** The parties were directed in PO 1 to provide copies of all existing Protective Orders. None were provided and therefore the Presiding Officer presumes that none exist. If such orders exist, send them immediately. The PO 1 deadline was 5 Jan 2006.

4. Protective Orders.

a. The three attached Protective Orders have been issued pursuant to Commission Law *sua sponte* by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial.

b. Counsel who wish this order modified or rescinded shall follow the Procedures in POM 9-1.

5. Motions on the Discovery Order (PO 2.)

a. Counsel are reminded that in accordance with PO 1, the due date for any motion on the Discovery Order is 31 Jan 2006. Responses and replies will be filed in accordance with POM 4-3.

b. Any motion filed on the Discovery Order will be litigated during the February trial term.

RE 34 (al Qahtani)
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6. Voir dire. If counsel desire to voir dire and/or to challenge the Presiding Officer, this will be accomplished during the February trial term.

a. A mini biography of the Presiding Officer is attached to assist counsel.

b. Counsel are strongly encouraged to submit written question for the Presiding Officer. Such questions will be provided to the APO, Presiding Officer, and opposing counsel not later than 8 Feb 2006 in *Word (not PDF)* so the Presiding Officer can answer the questions in the same electronic file.

7. Setting a trial calendar. Not later than 15 Feb, counsel for both sides will complete the attached "Trial Schedule" filling in the appropriate dates and file it with the APO, Presiding Officer and opposing counsel.

8. Entry of pleas. The accused will be called upon to enter pleas. (If the accused requests to defer pleas, the Presiding Officer advises he will grant the request.)

9. Motions (other than on the Discovery Order.) Counsel may file motions in accordance with POM 4-3. Such motions a party desires litigated at the February trial term shall be filed not later than 6 Feb 2006. Responses shall be filed not later than 7 days from the filing of the motion. Replies, if desired, shall be filed not later than 3 days from when the response was filed. All filing will be done electronically. Be attentive to the requirements of POM 4-3.

10. Motions other than the Discovery Order and those motions filed in accordance with paragraph 9 above. The parties will be asked if they have motions or other motions if motions were made. (If the parties request to defer motions - except a motion as to the wording, terms, and enforceability of the Discovery Order - the Presiding Officer advises he will grant the request.)

11. Inability to perform functions and unavailability. If there is any reason why counsel cannot perform the functions listed in this Order, such matters will be filed with the APO, Presiding Officer, and opposing counsel not later than 26 Jan clearly indicating the functions that counsel cannot perform and the reasons therefore. It is noted that in an email sent on 19 January 2006 (PO 1 E copy attached,) counsel already have an obligation to advise on their possible non-availability. Paragraph 5 of that email stated:

5. If any counsel in the above listed cases cannot be at GTMO during the February trial/session term, advise the Assistant, and the Presiding Officer and opposing and other counsel on that case, **NLT 1200, EST (Monday) 23 January 2006** with the reasons for the unavailability.

12. Representational issues and unavailability (Defense counsel.) Para 6 of PO 1 E stated:

6. All Defense counsel.

a. The fact that an attorney client relationship has not yet been established, or a client has indicated he wishes to proceed pro se, does

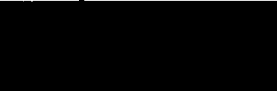
not amount to "unavailability," and it may suggest a session in February is paramount. Counsel are encouraged to provide such information, however, as it might be useful in planning sessions.

b. Detailed Defense Counsel will advise if there are any other counsel (military or civilian) who are also detailed, or who may be detailed or may join the case in the future, and who are not on the attached list. If there are other such counsel, advise the Assistant, Presiding Officer, and other counsel on the case and provide email addresses and other contact information.

Attachments to this email Trial Order

1. Three Protective Orders issued by the Presiding Officer
2. Mini-biography of the Presiding Officer
3. Trial schedule form (Significant Dates)
4. PO 1 E

BY DIRECTION OF THE PRESIDING OFFICER
 Keith Hodges
 Assistant to the Presiding Officers
 Military Commission



<<Significant Commission Dates - worksheet - Feb trial term trial Order attachment.doc>>
 <<CAPT O'Toole Biographical Summary - Voir Dire.pdf>> <<PO 1 E - al Qahtani -
 Announcement of Feb trial term, 18 Jan 06.pdf>> <<Protective Order 1 - al Qahtani - ID of all
 witnesses (23 Jan 06).pdf>> <<Protective Order 2 - al Qahtani - ID of investigators (23 Jan
 06).pdf>> <<Protective Order 3 - al Qahtani - FOUO and other markings (23 Jan 06).pdf>>

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Friday, February 17, 2006 5:23 PM
To: [REDACTED]

Subject: POs memo on 13 Feb 8-5 Conference: US v. al Qahtani
Attachments: PO Memo of 13 Feb, 8-5 Conference (17 Feb).doc

The Presiding Officer prepared the subject memoranda and asked me to send it to counsel.

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

<<PO Memo of 13 Feb, 8-5 Conference (17 Feb).doc>>

At the request of the detailed defense counsel, the Presiding Officer conducted a conference under Paragraph 8-5, MCO # 1, on 13 February 2006 with the prosecution counsel and detailed defense counsel.

The purpose of the conference was to allow the PO to facilitate discussion among counsel in order to attempt to resolve protective order and discovery related issues, and to narrow and more clearly delineate issues remaining for future litigation. No motions were raised or filed during the conference, and there were no rulings entered by the PO.

This is not intended to be a synopsis of the 8-5 conference, but is merely a summary of background information sufficient to place action items in context. The statements below are not findings by the PO, and counsel need not object to them, but may offer corrections or clarifications by email to the PO, if desired, with a copy to all other counsel. Comments by counsel on the corrections or clarifications of opposing counsel are not necessary.

1. Protective Order.

BACKGROUND

A. Access to General and Common Information Disclosed in Discovery. There appear to be at least three tiers of information disclosed to detailed defense counsel:

a. **General Allegations.** Information related to the general allegations has been (or will be in the due course of other cases) disclosed to counsel representing all accused whose cases have been referred for trial by military commission. The prosecution did not anticipate having an objection to information supporting the general allegations being discussed among and between defense counsel detailed to any case.

b. **Common Information.** Information related to specific allegations in a particular case might also be common to one or more other cases. For example, the prosecution has moved to consolidate for joint trial the cases referred against Messers al Qahtani, al Sharbi, and al Barhoumi. Information disclosed to detailed defense counsel in these cases is common to all three. Some information in any one of these cases might also be common to other cases. The prosecution did not anticipate having an objection to information common to allegations in these three cases being discussed among and between defense counsel detailed to these three cases. Similarly, the prosecution did not anticipate having an objection to any information common to any two or more cases being discussed by defense counsel detailed to those two or more cases to whom the information has been provided in discovery in their respective cases.

c. **Unique Information.** Information related to specific allegations in any particular case might not be common to any other case. Although this might be true in some case, there appears to be no information disclosed to detailed defense counsel in the case against Mr. al Qahtani that is not also in common with cases against al Sharbi and al Barhoumi, though there may be information disclosed to detailed defense counsel in these three cases that has not been disclosed and is not common to allegations in any other case. As noted, the prosecution does not anticipate having an objection to information disclosed to defense counsel in these three cases being discussed among the

counsel detailed to these three cases. However, the prosecution anticipates an objection to disclosure or discussion of any information between or among defense counsel in any other case to whom the prosecution has not disclosed the same information.

B. Access to Specific Information Disclosed in Discovery.

a. There appears to be no dispute that all counsel detailed to any case have (or will have) the requisite clearances at the time of discovery disclosure. Counsel were, however, uncertain about whether military detailed defense counsel have, or are required to, sign non-disclosure agreements.

b. There is uncertainty whether counsel subject to protective orders in other cases are limited by those orders from discussing information common to other cases, as described above.

c. There is uncertainty whether detailed defense counsel have a general or recurring need to discuss protected information with the Chief Defense Counsel, though there might be a particular need to do so under specific circumstances. It was also not resolved whether and under what circumstances detailed defense counsel may disclose or discuss protected information with the Chief Defense Counsel.

ACTION:

Prosecution agreed to do the following:

1. Clarify the administrative process necessary for defense counsel to obtain access to protected information, specifically including the requirements for signing of a non-disclosure agreement. Advise the detailed defense counsel and the APO.
2. Compare protective orders in other cases and clarify the position of the prosecution as to whether those orders adequately protect information disclosed to detailed defense counsel in this case in the event he discusses that information with other defense counsel to whom the common information has been disclosed under another case protective order. Advise the detailed defense counsel and the APO.
3. Propose to the detailed defense counsel wording for a modified Protective Order that:
 - a. Clarifies the information defense counsel may discuss with other defense counsel. This may be by setting forth the description of information in the Protective Order or by reference to an appendix to the Order;
 - b. Clarifies that the detailed defense counsel may disclose and discuss redacted summaries of interview with the accused.
 - c. Reflects the prosecution position with respect to the need to have all counsel discussing protected information subject to the protective order of the same PO, including whether, as an alternative, protective orders in other cases may be incorporated by reference in the protective order in this case;
 - d. Reflects the prosecution position with respect to access to protected information by the Chief Defense Counsel; and

e. Accurately reflects the administrative requirements for access by military detailed defense counsel and civilian defense counsel to protected information subject to the protective order.

ACTION: Detailed Defense Counsel agreed to: Review and discuss with the prosecution modifications to the protective order proposed by the prosecution and, when that discussion is complete, detailed defense counsel will indicate via email to the prosecution and to the APO which modifications proposed by the prosecution are acceptable, which modifications are not acceptable, and propose any additional modifications.

2. Discovery

a. Access to Unredacted "Form 40s": The prosecution has disclosed to the detailed defense counsel certain summaries of interview on forms designated as a "Form 40." The names of certain participating agents and linguists from one federal law enforcement agency have been redacted from the Form 40s. This is apparently required by a memorandum of agreement between the prosecution and the law enforcement agency as a means of protecting against a possible inadvertent disclosure of the document to unauthorized persons.

ACTION: The prosecution has agreed to:

1. In view of the disparate procedures between law enforcement agencies, the prosecution agreed to revisit the need for the additional redaction precautions with the law enforcement agencies concerned with a view towards achieving a standard practice.

2. If the law enforcement agencies concerned continue to require the redaction precaution, prosecution has agreed to provide the detailed defense counsel with a separate document that contains an accurate reference matrix by which the defense can readily identify the redacted information and relate it to specific Form 40s.

3. The prosecution will also make the original Form 40s available for inspection by the detailed defense counsel.

b. Electronic Disclosures. The prosecution disclosed a portion of information to the detailed defense counsel in the form of an electronic file composed of approximately 1800 pages of data identified with an extension of ".pdf." The detailed defense counsel has been unable to execute an electronic term search for key terms in the .pdf file. This The prosecution uses the same file and has successfully used an electronic term search function to access it.

ACTION:

1. The prosecution has agreed to provide a technical consultant to work with the detailed defense counsel's designated technical consultant. Both technical personnel will work to discover whether the .pdf file is damaged or otherwise defective, whether a change in software or other access protocol is required, or whether the detailed

defense counsel's inability to term search the .pdf file is caused by hardware or other limits.

2. If the technical consultants determine that the .pdf file is damaged, prosecution has agreed to provide the detailed defense counsel with a new file.

3. If the technical consultants determine that the .pdf file is not accessible due to hardware or other limitation, the detailed defense counsel agreed to elevate that to the Chief Defense Counsel for resolution.

Additional information: Though not explicitly discussed at the conference, the Presiding Officer takes note that one can ever guarantee that an OCR scan is 100% accurate. That is because OCR scanning only takes a picture of the individual letters comprising a document, attempts to figure out what the letters are, and then creates a new document. 100% accurate OCR documents simply do not exist because the software might not read a letter correctly, especially in the case of special fonts, attributes (underlining, bold etc), forms, or when the originally scanned document is not smooth, flat, or straight when being scanned, or when text is damaged, such as by smearing or in the case of imperfectly printed letters or characters. Modifications to existing DOs may be required to address the technical aspects of electronic disclosure.

c. **Synopsis of Witness Testimony.** Detailed defense counsel asserted that the prosecution has not provided useful synopsis of testimony for all witnesses. The prosecution responded that the defense was provided the identifications of witnesses and references to the substantive statements or summaries of interview of those witnesses in lieu of providing a summary. For some witnesses, the substantive statements or summaries of interview have not yet been provided due to an extension granted by the PO.

ACTION: The prosecution agreed to verify that all witnesses identified are referenced to a statement or summary of interview or that a synopsis is provided.

d. **Exculpatory Information.** The detailed defense counsel is not satisfied that all exculpatory information known to the prosecution has been disclosed. The prosecution maintains that they have fully complied with discovery requirements and the prosecution is uncertain what additional information the defense wishes to be disclosed.

ACTION: The detailed defense counsel agreed to request via email to the prosecution the information the defense seeks in addition to that already disclosed by the prosecution.

3. **Status of Representation.** The detailed defense counsel took the conservative view that all representational actions are ethically constrained by his currently ambiguous status pending "arraignment" and election of counsel rights by the accused, including his ability to file motions for relief with respect to discovery. Detailed defense counsel said that, although he has solicited guidance on his status from his state bar and the Army Judge Advocate General's Office, he has not solicited specific guidance on whether or not he is ethically constrained from filing a motion for relief in the context of discovery.

ACTION: No action was agreed upon. However, the PO indicated that the duties of the detailed defense counsel are set forth in Commission Law and that it is a matter of record that the detailed defense counsel has been assigned to represent the accused in this case. If the detailed defense counsel believes that he has an ethical impediment to any aspect of his representation of the accused or there is an ethical limit to his ability to comply with any order issued thus far in this case, the PO noted that there is nothing yet in the record to indicate that such an ethical impediment exists, such as an opinion from the detailed defense counsel's bar or the Army Judge Advocate General's office.

Supplemental Voir Dire Materials – CAPT O'Toole

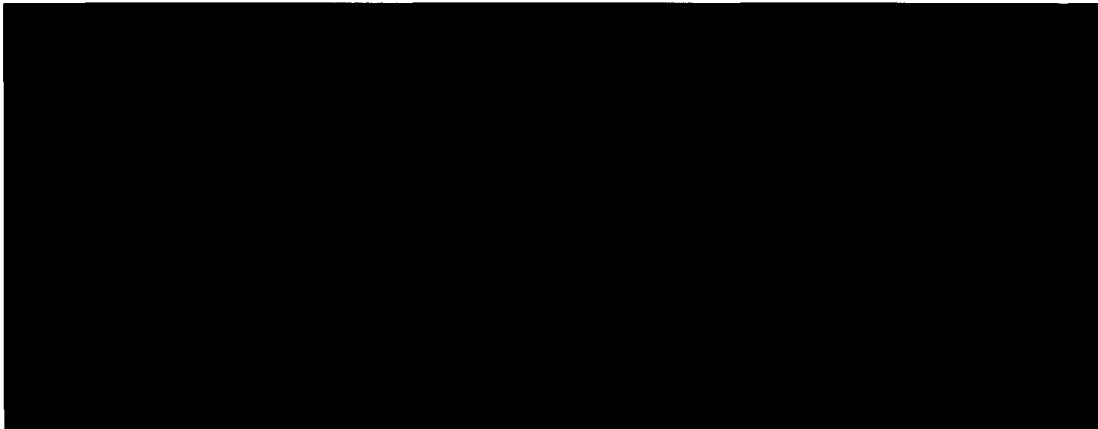
In the interest of ensuring a full and fair trial, and to assist counsel in preparing voir dire, the Presiding Officer provides the following to supplement the previously-provided biography. This document will be made Review Exhibits in the cases of *United States v. al Qahtani, al Sharbi, and Barhoumi*.

Relationship to Deputy Secretary of Defense (DEPSECDEF).

In my capacity as Executive Assistant to the Navy General Counsel, I had occasion to meet Secretary of the Navy Gordon England, who now serves as DEPSECDEF. My contacts with the Secretary England were always in my professional capacity and consisted solely of meetings that I attended with the Navy General Counsel. One of my duties consisted of assisting the General Counsel with the staffing of various documents necessary to stand up the status review process for detainees held at Guantanamo Bay. My role was only process related and I was not made privy to any allegations in any case to which I have been detailed or any other case pending before a military commission. I have never discussed the military commissions, any case to which I have been detailed, or any other case pending before a military commission with Secretary England.

Relationship to Department of Defense General Counsel (DoD GC).

In my capacity as Executive Assistant to the Navy General Counsel, I had occasion to meet the DoD General Counsel on several occasions. My contacts with the DoD GC were always in my professional capacity and consisted solely of meetings that I attended with the Navy General Counsel. I have never discussed the military commissions, the facts in any case to which I have been detailed, or any other case pending before a military commission with the DoD GC.



Hodges, Keith

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Thursday, February 23, 2006 8:06 AM
To: [REDACTED]

Subject: RE: Withdrawal of Prosecution Joinder Motion ICO Sharbi, Barhoumi, al Qahtani-Joinder Documents

No objection.

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Tuesday, February 21, 2006 17:57
To: [REDACTED]

Subject: Withdrawal of Prosecution Joinder Motion ICO Sharbi, Barhoumi, al Qahtani-Joinder Documents

Do any defense counsel in the subject cases object to the government's request to withdraw the joinder motion?

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: [REDACTED]
Sent: Tuesday, February 21, 2006 4:35 PM
To: [REDACTED]

RE 37 (al Qahtani)
Page 1 of 30

2/23/2006

[REDACTED]

Subject: RE: Sharbi, Barhoumi, al Qahtani-Joinder Documents (FOUO)

Sir,

Prosecution requests to withdraw the joinder motion.

v/r

LT [REDACTED]

-----Original Message-----

From: Hodges, Keith [REDACTED]

Sent: Thursday, February 16, 2006 15:01

To: [REDACTED]

[REDACTED]

Subject: Sharbi, Barhoumi, al Qahtani-Joinder Documents (FOUO)

1. Counsel in *United States v. al Sharbi, Barhoumi and al Qahtani*, your attention is invited to the below email and the attachment.
2. Prosecution, do you withdraw your joinder motion in each of these cases?
3. Defense, if the Prosecution withdraws its joinder motion, do you object to their request to do so?

FOR THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission

[REDACTED]

From: Harvey, [REDACTED]

RE 37 (al Qahtani)
Page 2 of 30

Sent: Thursday, February 16, 2006 2:36 PM
To: 'Hodges, Keith'
Subject: Sharbi, Barhoumi, al Qahtani-Joinder Documents (FOUO)

Mr. Hodges,

Please distribute the attached 27-page file to the parties in *United States v. al Sharbi, Barhoumi and al Qahtani*.

It is FOUO as it contains sensitive information, such as the names of the Commission members.

This file contains the following documents:

1. Appointing Authority decision dated 15 Feb. 2006 (1 page)
2. CPT Faulker's comments on joinder issue, dated 8 Feb. 2006 (2 pages)
3. LTC Broyles' comments on joinder issue, dated 9 Feb. 2006 (1 page)
4. LT Kuebler's comments on joinder issue, dated 9 Feb. 2006 (1 page)
5. BG Hemingway's request for LTC Broyles' comments, dated 3 Feb. 2006 (1 page)
6. BG Hemingway's request for CPT Faulker's comments, dated 3 Feb. 2006 (1 page)
7. BG Hemingway's request for LT Kuebler's comments, dated 3 Feb. 2006 (1 page)
8. Prosecution request for joinder, 2 Feb. 2006 (2 pages with the below 6 enclosures)
 1. Appointing Order 05-0006 (*United States v. al Sharbi*) (1 page)
 2. Appointing Order 05-0007 (*United States v. Barhoumi*) (1 page)
 3. Appointing Order 05-0008 (*United States v. al Qahtani*) (1 page)
 4. Charge Sheet *United States v. al Sharbi* (4 pages)
 5. Charge Sheet *United States v. al Qahtani* (5 pages)
 6. Charge Sheet *United States v. Barhoumi* (5 pages)

M. Harvey
Chief Clerk of Military Commissions



LEGAL ADVISOR TO THE
APPOINTING AUTHORITY

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

February 15, 2006

MEMORANDUM FOR COLONEL MORRIS D. DAVIS, CHIEF PROSECUTOR

SUBJECT: Request for Consolidation of Cases: Appointing Order 05-0006; Appointing Order 05-0007; Appointing Order 05-0008

I have considered the matters submitted with your request, as well as those submitted by LTC Broyles, CPT Faulkner, and LT Kuebler (detailed defense counsel). I adhere to my earlier, individual referral decisions in the cases of United States v. al Sharbi, United States v. Barhoumi, and United States v. al Qahtani. Accordingly, your request is denied.

John D. Altenburg, Jr.
Appointing Authority for Military Commissions

cc: Chief Defense Counsel for Military Commissions
LTC Bryan T. Broyles
CPT Wade N. Faulkner
LT William C. Kuebler



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1629 DEFENSE PENTAGON
WASHINGTON, DC 20301-1629

February 8, 2006

MEMORANDUM FOR Major General Thomas L. Hemingway, Legal Advisor to the
Appointing Authority for Military Commissions 1600 Defense Pentagon, Washington, D.C.
20301

SUBJECT: Response to Request for Consolidation of Cases: Appointing Orders 05-006, 05-007, and 05-008

1. On 2 February 2006, the Chief Prosecutor for Military Commissions requested consolidation of the above cases into one joint trial. On 3 February 2006, you issued guidance to Defense Counsel that you sought concurrence, objection, or comment.

2. As the Detailed Defense Counsel in the case of United States v. Barhoumi, Appointing Order 05-007, the Defense objects to the consolidation of any cases.

3. There are several reasons for the Defense objection:

a. In the Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (November 16, 2001), hereafter referred to as the President's Military Order, Section 4(a) states, "Any *individual* subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such *individual* is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death." [Emphasis added].

b. Section 6(a) of the President's Military Order provides, "As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order."

c. In light of the President's Military Order, there is no authority for the requested consolidation of cases. The President's Military Order refers only to an individual, not to individuals. The plain meaning of this language evidences an intent on the part of the President to only try a single individual before any military commission. Any orders or regulations issued by the Secretary of Defense that flow from this order that purport to authorize joint trials exceed the power delegated by the President.

d. Even if the Appointing Authority has the power to authorize joint trials, he has not done so in this case. Each case was referred separately with no indication that the trials were to be joined together. The Preamble to the Manual for Courts-Martial (2205 Edition), paragraph 2(b)(2) states, in pertinent part, "military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-

[REDACTED]

martial." The rules of procedure for courts martial are governed by the Rules for Court-Martial (RCM). RCM 601(e)(3) provides that "Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

e. In this case, assuming arguendo that the Appointing Authority could have referred the cases to a joint trial, the Appointing Authority made no indication in the Appointing Order that these cases were to be tried jointly. The fact that all the referenced cases are comprised of the same Presiding Officer and Commission Members is of no consequence. Oftentimes in the case of courts-martial, cases are referred to the same court-martial convening order. However, without an indication of an intent to try cases together, each case is tried separately.

f. Even if the Appointing Authority were to have referred these cases to a joint trial, such joinder would be inappropriate in this case. The discussion to RCM 610(e)(3) states, "Convening authorities should consider that joint and common trials may be complicated by procedural and evidentiary rules." In the instant case, there are numerous potential complications posed by a joint trial. By way of example only, there is an argument that the Sixth Amendment confrontation clause applies in the commission system and that the US Supreme Court case of Crawford v. Washington will preclude the use of a declarant's statements against an alleged co-conspirator but would allow them against the declarant himself. In this case, such a situation may arise where a statement of Mr. Al Sharbi or Mr. Al Qahtani, while admissible against them in their individual trials, will not be admissible in Mr. Barhoumi's trial. In a joint trial context, the commission members, most of whom are non-lawyers, would be asked to keep such evidence separate and apart. This will prove impossible to do.

4. In light of the above, the Defense in the case of United States v. Barhoumi respectfully requests you deny the Government's request for consolidation of cases.


WADE N. FAULKNER
Captain, US Army
Detailed Defense Counsel

cc:
Col Dwight Sullivan, USMCR
[REDACTED]

Mr, DoD OGC

From: [REDACTED] Mr, DoD OGC
Sent: Friday, February 10, 2006 07:11
To: [REDACTED] DoD OGC
Subject: FW: Joinder of Al Qahtani with other cases

FYI

-----Original Message-----

From: Hemingway, Thomas, BG, DoD OGC
Sent: Thursday, February 09, 2006 16:11
To: [REDACTED] Mr, DoD OGC
Subject: FW: Joinder of Al Qahtani with other cases

FYI

Thomas L. Hemingway, Brig Gen, USAF
Legal Advisor to the Appointing Authority
Office of Military Commissions (DoD)
[REDACTED]

-----Original Message-----

From: Broyles, Bryan, LTC, DoD OGC
Sent: Thursday, February 09, 2006 2:16 PM
To: Hemingway, Thomas, BG, DoD OGC
Cc: [REDACTED]
Subject: Joinder of Al Qahtani with other cases

Sir,

I oppose the joinder of these cases. I have not as yet formed an attorney client relationship with Jabran Sa'ad Al Qahtani and therefore cannot act on his behalf. I believe this to be a matter that is representational in nature. I was unable to discuss this with my client during my visit to Guantanamo this week, and thus do not know his stance on the matter.

In the interim, I oppose the joinder, not because I believe that is the wish of Mr. Al Qahtani, but because it represents a change in his status to which that he should have the right to object or acquiesce. The current status is that his case is separate, and it should continue as such until he has the right to express his views on that, either through counsel or otherwise.

As a factual matter, the prosecution states, "The factual allegations against all three accused are the same, in fact, the charge sheets for all three individuals are identical aside from their caption." This is incorrect. The "factual allegations" are distinct, as a read of the charge sheet reveals. In the charge sheet against Al Qahtani the government did include allegations against the other accused, but those are not factual allegations "against" Al Qahtani. The fact that the government chose to simply cut and past the captions of the charge sheets has no legal impact.

Bryan Broyles
LTC, JA
[REDACTED]

Mr, DoD OGC

From: [REDACTED] Mr, DoD OGC
Sent: Friday, February 10, 2006 07:49
To: [REDACTED] Mr, DoD OGC
Subject: FW: U.S. v. al Sharbi (Request for Consolidation of Cases)

FYI

-----Original Message-----

From: Hemingway, Thomas, BG, DoD OGC
Sent: Friday, February 10, 2006 07:38
To: [REDACTED] Mr, DoD OGC
Subject: FW: U.S. v. al Sharbi (Request for Consolidation of Cases)

FYI

Thomas L. Hemingway, Brig Gen, USAF
Legal Advisor to the Appointing Authority
Office of Military Commissions (DoD)
[REDACTED]

-----Original Message-----

From: Kuebler, William, LT, DoD OGC
Sent: Thursday, February 09, 2006 4:44 PM
To: Hemingway, Thomas, BG, DoD OGC
Cc: Sullivan, Dwight, COL, DoD OGC
Subject: U.S. v. al Sharbi (Request for Consolidation of Cases)

Sir,

I received your memorandum of 3 Feb 06. Please be advised that although detailed, I have been unable to meet with Mr. al Sharbi, have not formed an attorney-client relationship with him, and do not currently consider myself to represent him in connection with this matter. In addition, I do not know whether Mr. al Sharbi desires other military counsel, civilian counsel, or to represent himself in connection with commission proceedings. I had hoped to clarify my status and Mr. al Sharbi's desires during a trip to GTMO this week, but notwithstanding efforts by the prosecution to facilitate access to Mr. al Sharbi (pursuant to my written request of 17 Jan 06), JTF GTMO refused to allow me to enter the camp in which Mr. al Sharbi is being detained to speak with him directly. Accordingly, I am unable to provide "input" or otherwise take a position on behalf of Mr. al Sharbi concerning the prosecution's request to consolidate Mr. al Sharbi's case with those of Messrs. al Qahtani and Barhoumi.

I will note, however, that there appears to be no authority under so-called "Commission Law" for the "consolidation" of commission cases. The Chief Prosecutor's strained interpretation of certain language from DoD Directive 5105.70 confirms the point. Moreover, even if I did represent Mr. al Sharbi and the Appointing Authority possessed the authority to join these cases, I would be unable to comment intelligently without some idea of the government's evidence against Mr. al Sharbi and consequent ability to evaluate the potential for prejudice to Mr. al Sharbi resulting from "joinder" of his case with those of Messrs. al Qahtani and Barhoumi. At present, I have not personally received or reviewed any evidence in connection with this case. Finally, since I do not currently represent Mr. al Sharbi, I wish to note my continuing discomfort at being included in *ex parte* communications concerning his case. I realize that I may be "ordered" to represent Mr. al Sharbi over his objection or otherwise forced upon him at some point, however, unless and until this happens, I respectfully request not to be included in communications about his case or regarded as his legal representative.

VR, WCK

LT William C. Kuebler, JAGC, USN



LEGAL ADVISOR TO THE
APPOINTING AUTHORITY


OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

February 3, 2006

MEMORANDUM FOR LIEUTENANT COLONEL BRYAN T. BROYLES

SUBJECT: Re: Request for Consolidation of Cases: United States v. al Qahtani; United States v. Barhouni; United States v. al Sharbi

1. I have received the attached request from the Chief Prosecutor for consolidation of the above-styled cases. Before advising the Appointing Authority on the disposition of this matter, I am referring the request to you for your concurrence, opposition, or comment.
2. Because of the need for expeditious resolution, I must receive your input no later than COB February 8, 2006.


Thomas L. Hemingway
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel for Military Commissions

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RE 37 (al Qahtani)
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LEGAL ADVISOR TO THE
APPOINTING AUTHORITY

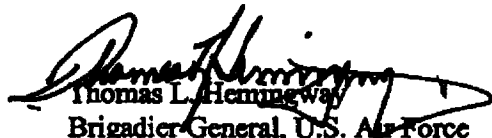
OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

February 3, 2006

MEMORANDUM FOR CAPTAIN WADE N. FAULKNER

SUBJECT: Re: Request for Consolidation of Cases: United States v. al Qahtani; United States v. Barhoumi; United States v. al Sharbi

1. I have received the attached request from the Chief Prosecutor for consolidation of the above-styled cases. Before advising the Appointing Authority on the disposition of this matter, I am referring the request to you for your concurrence, opposition, or comment.
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Thomas L. Hemmingway
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel for Military Commissions

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RE 37 (al Qahtani)
Page 10 of 30



LEGAL ADVISOR TO THE
APPOINTING AUTHORITY


OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

February 3, 2006

MEMORANDUM FOR LIEUTENANT WILLIAM KUEBLER

SUBJECT: Re: Request for Consolidation of Cases: United States v. al Qahtani; United States v. Barhoumi; United States v. al Sharbi

1. I have received the attached request from the Chief Prosecutor for consolidation of the above-styled cases. Before advising the Appointing Authority on the disposition of this matter, I am referring the request to you for your concurrence, opposition, or comment.
2. Because of the need for expeditious resolution, I must receive your input no later than COB February 8, 2006.


Thomas L. Hemingway
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel for Military Commissions



[REDACTED]
**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610**

February 2, 2006

MEMORANDUM FOR APPOINTING AUTHORITY FOR MILITARY COMMISSIONS

SUBJECT: Request for Consolidation of Cases: Appointing Order 05-0006; Appointing Order 05-0007; Appointing Order 05-0008

1. In December of 2005, Appointing Orders were signed in the following cases:

- a. *United States v. al Sharbi*
- b. *United States v. Barhoumi*
- c. *United States v. al Qahtani*

All three of the accused listed above are charged with the same crimes arising out of the same criminal conduct. The factual allegations against all three accused are the same, in fact, the charge sheets for all three individuals are identical aside from their caption. All three cases were separately designated to be tried by Military Commissions comprised of the same Presiding Officer and Commission Members.

2. The Prosecution respectfully requests that the Appointing Authority consolidate these cases pursuant to the authority to "Issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order (reference (c)) and reference (d); and appoint any other personnel necessary to facilitate military commissions." DoDD 5105.70, *Appointing Authority for Military Commissions*, Feb 10, 2004, para 4.1.1. Since *United States v. al Sharbi* and *United States v. Barhoumi* have been included on the trial term beginning on 27 February 2006, the Prosecution requests that this matter be resolved prior to the initiation of proceedings.

3. As all three cases could have been designated for trial in the same Military Commission and in fact have been referred to the same Presiding Officer and Commission Members, consolidation serves the interests of justice and judicial economy. Because the factual allegations against each accused are identical, separate proceedings would require litigation of the same legal challenges and presentation of the same evidence on three separate occasions. Rather than requiring the same Presiding Officer to make legal rulings and the same Commission Members to make factual determinations in three identical but separate proceedings, one unified proceeding would clearly serve the interest of judicial economy and the interest of justice. While the Prosecution is mindful of the potential logistical challenges that may be involved if all three cases are consolidated, the interests of justice and judicial economy as outlined above clearly outweigh any burden associated with overcoming these logistical challenges.

4. If you have any questions regarding this request or require any further information, please contact me, or the detailed Lead Prosecutor for these cases, LT [REDACTED]

[REDACTED]
RE 37 (al Qahtani)
Page 12 of 30





MORRIS D. DAVIS
Colonel, USAF
Chief Prosecutor

cc:

Col Dwight Sullivan, USMCR
LTC Bryan Broyles, USA
CPT Wade N. Faulkner, USA
LT William Kuebler, USN

Encl:

1. Appointing Order 05-0006 (*United States v. al Sharbi*)
2. Appointing Order 05-0007 (*United States v. Barhoumi*)
3. Appointing Order 05-0008 (*United States v. al Qahtani*)
4. Charge Sheet *United States v. al Sharbi*
5. Charge Sheet *United States v. al Qahtani*
6. Charge Sheet *United States v. Barhoumi*

[REDACTED]

Military Commission Case No. 05-0005

UNITED STATES

v.

GHASSAN ABDULLAH AL SHARBI
a/k/a Abdullah al Muslim
a/k/a Abu Muslim

Military Commission Members

Appointing Order No. 05-0006

DEC 12 2005

The following officers are appointed to serve as members and alternate members, respectively, of a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member or alternate member will serve until removed by proper authority.

In the event that one or more of the members, not including the Presiding Officer, is removed by the Appointing Authority, one or more of the alternate members will automatically be appointed, in order, to replace the removed member(s), until either all removed members have been replaced or no alternate members remain. Should the Presiding Officer grant a challenge for cause against any member, that member will be removed as a member, excused from further proceedings, and automatically replaced by the next alternate member. Any alternate member appointed under the automatic replacement provisions herein described shall become a member of the commission and shall be subject to removal and automatic replacement as if originally appointed as a member. In accordance with Paragraph 4(A)(1)&(2) of Military Commission Order No. 1, should no alternate member be available to replace any member I remove or any member removed pursuant to a challenge for cause, and provided that at least three members, in addition to the Presiding Officer, remain, the commission may proceed without appointment of additional members.

Captain Daniel E. O'Toole, USN, Presiding Officer

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USA, Member

Colonel [REDACTED] USA, Member

Captain [REDACTED] USN, Member

Lieutenant Commander [REDACTED] USN, First Alternate Member

Lieutenant Colonel [REDACTED] MC, Second Alternate Member


John D. Altenburg, Jr.

Appointing Authority for Military Commissions

[REDACTED]

Military Commission Case No. 05-0006

UNITED STATES	)	Military Commission Members
)	
v.	)	Appointing Order No. 05-0007
)	
SUFYIAN BARHOUMI)	
a/k/a Abu Obaida)	DEC 16 2005
a/k/a Ubaydah Al Jaza'iri)	
a/k/a Shafiq)	

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Captain Daniel E. O'Toole, USN, Presiding Officer

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USA, Member

Colonel [REDACTED] USA, Member

Captain [REDACTED] USN, Member

Lieutenant Commander [REDACTED] USN, First Alternate Member

Lieutenant Colonel [REDACTED] MG, Second Alternate Member


John D. Altenburg, Jr.

Appointing Authority for Military Commissions

[REDACTED]

[REDACTED]

Military Commission Case No. 05-0007

UNITED STATES	)	Military Commission Members
)	
v.	)	Appointing Order No. 05-0008
)	
JABRAN SAID BIN AL QAHTANI)	
a/k/a Salam al Farsi)	
a/k/a Hateb)	
a/k/a Jabran al Qahtan	)	DEC 16 2005
a/k/a Saad Wazar Hatib Jabran)	
a/k/a Jabran Saad Wazar Sulayman)	
a/k/a Jabran Wazar)	

The following officers are appointed to serve as members and alternate members, respectively, of a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member or alternate member will serve until removed by proper authority.

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Captain Daniel E. O'Toole, USN, Presiding Officer
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] Gillan, USAF, Member
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USA, Member
Colonel [REDACTED] USA, Member
Captain [REDACTED] USN, Member
Lieutenant Commander [REDACTED] USN, First Alternate Member
Lieutenant Colonel [REDACTED] MC, Second Alternate Member


John D. Altenburg, Jr.
Appointing Authority for Military Commissions

[REDACTED]

UNITED STATES OF AMERICA)	
)	
v.)	
)	
GHASSAN ABDULLAH AL SHARBI	)	CHARGE:
a/k/a Abdullah al Muslim	)	CONSPIRACY
a/k/a Abu Muslim)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Ghassan Abdullah al Sharbi (a/k/a/ Abdullah al Muslim a/k/a/ Abu Muslim hereinafter "al Sharbi") is subject to his Military Order of November 13, 2001.
2. The charged conduct alleged against al Sharbi is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In 1992 and 1993, al Qaida supported violent opposition of U.S. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.
9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyan Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:
 - a. In 1998 Barhoumi, an Algerian citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated training camp, where he received training in constructing and dismantling electronically-controlled explosives.
 - b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.

- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bay'at* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.
- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.
- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.

- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
 - m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
 - n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
 - o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
 - p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
 - q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.
 - r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.
15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

UNITED STATES OF AMERICA)	
)	
v.)	
)	
JABRAN SAID BIN AL QAHTANI	)	CHARGE:
a/k/a Salam al Farsi	)	CONSPIRACY
a/k/a Hateb)	
a/k/a Jabran al Qahtan)	
a/k/a Saad Wazar Hatib Jabran)	
a/k/a Jabran Saad Wazar Sulayman)	
a/k/a Jabran Wazar)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Jabran Said Bin al Qahtani (a/k/a/ Salam al Farsi a/k/a Hateb a/k/a Jabran Qahtan a/k/a/ Saad Wazar Hatib Jabran a/k/a/ Jabran Saad Wazar Sulayman a/k/a Jabran Wazar) is subject to his Military Order of November 13, 2001.
2. The charged conduct alleged against al Qahtani is triable by a military commission.

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training camp, where he received training in constructing and dismantling electronically-controlled explosives.

- b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.
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- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.
- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
- m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
- n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
- o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
- p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
- q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.

r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.

15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

v.

**CHARGE:
CONSPIRACY**

9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.
10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyian Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a/ Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:
 - a. In 1998 Barhoumi, an Algerian-citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated training camp, where he received training in constructing and dismantling electronically-controlled explosives.

- b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.
- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bay'at* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.
- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.

- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.
- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
- m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
- n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
- o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
- p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
- q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.
- r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.

15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

UNITED STATES OF AMERICA
v.
JABRAN SAID BIN AL QAHTANI
a/k/a Salam al Farsi
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a/k/a Jabran al Qahtan
a/k/a Saad Wazar Hatib Jabran
a/k/a Jabran Saad Wazar Sulayman
a/k/a Jabran Wazar

PO 2 F

Discovery Status Order

2 March 2006

This Discovery Status Order has been issued pursuant to Commission Law sua sponte by the Presiding Officer to ensure that the discovery process in this matter is being conducted in such a manner as to ensure a full and fair trial. Counsel who desire this order modified or rescinded shall follow the procedures in POM 4-3.

1. The Prosecution is directed to provide a succinct summary of the manner in which the Prosecution has complied to date with the individual subparts of paragraph 14 of the Discovery Order of 21 December 2005 (PO-2). The Prosecution response shall include actions taken to comply with any Discovery deadline extended at the Prosecution request. The Prosecution response to this Discovery Status Order shall be filed not later than 1700 on 10 March 2006.
2. The Prosecution shall also describe any other actions taken by the Prosecution to resolve Detailed Defense Counsel requests, concerns, or objections to the manner in which the Prosecution has disclosed information, including those matters addressed in the summary of the 8-5 Conference of 13 February 2006.
3. The Detailed Defense Counsel shall provide a reply to the Prosecution response to this Discovery Status Order not later than 1700 on 15 March 2006. That reply shall indicate with what information in the Prosecution response the Detailed Defense Counsel concurs, with what information he disagrees, and he shall, in a separate paragraph or paragraphs, describe with particularity any action or inaction that the Detailed Defense Counsel asserts is a deficiency in the Prosecution's compliance with discovery, why any such action or inaction is defective under Discovery Order (PO-2), and the impact of any alleged noncompliance on the Detailed Defense Counsel's preparation.
4. The Detailed Defense Counsel is also directed to provide a succinct summary of the actions taken by the Detailed Defense Counsel to comply with paragraph 15 of the Discovery Order of 21 December 2005 (PO-2). The Detailed Defense Counsel's reply to this Discovery Status Order should be included in his reply to the Prosecution response to this Discovery Status Order and shall utilize the format of POM 4-3, enclosure (3), and it must be filed not later than 1700 on 15 March 2006.

IT IS SO ORDERED

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

RE 38 (al Qahtani)
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UNITED STATES OF AMERICA
v.
JABRAN SAID BIN AL QAHTANI
a/k/a Salam al Farsi
a/k/a Hateb
a/k/a Jabran al Qahtan
a/k/a Saad Wazar Hatib Jabran
a/k/a Jabran Saad Wazar Sulayman
a/k/a Jabran Wazar

PO 2 G
Modification to PO 2, (Discovery Order)

March 3, 2006

1. This filing modifies PO 2 (Discovery Order).

2. If either party objects to this modification, they shall file a motion in accordance with POM 4-3 not later than 10 March 2006.

3. Add the following to paragraph 10, PO 2:

a. If a matter required to be disclosed is in electronic form, it shall be provided to the opposing party in the same electronic form, unless the disclosing party is unable to do so as a result of a circumstance beyond that party's control, such as a proprietary program being unavailable to the parties, security considerations, or other similar limitation. In the event electronic matter is provided in a different form, the reason for doing so shall be specifically set forth in a transmittal document.

b. Electronic "searchability" of documents.

(1) It is generally not possible to create a completely accurate, text-searchable document using Optical Character Recognition (OCR) or other software, and no party is required to vouch that a text search of any electronic document disclosed by that party will be 100% accurate. While providing documents and other evidence in electronic form is the preferred method of disclosure, and while electronic text searching is a useful technology, it is not a substitute for reading or viewing the matter disclosed. A party receiving information in electronic media is responsible for reading all such information.

(2) Matter shall be considered to have been disclosed pursuant to this Discovery Order when the matter provided is viewable either as displayed on a computer monitor, printed, or in other hard copy form, regardless of whether an electronic text search reveals any particular information that is the object of a text search.

(3) At no time may a party convert a text-searchable or OCR document before serving it on the opposing party in order to prevent the opposing party from using text-search software or tools.

4. Change paragraph 12.c. to read:

c. "Synopsis of a witness' testimony" is that which the sponsoring counsel has a good faith basis to believe the witness will say, if called to testify.

RE 39 (al Qahtani)
Page 1 of 2

(1) A synopsis shall be prepared as though the subject witness is speaking (in the first person), and shall be sufficiently detailed as to demonstrate both the testimony's relevance and that the witness has personal knowledge of the matter being offered into evidence. *See* Enclosure 1, POM 10-2 for suggestions.

(2) If any matter that has been disclosed to an opposing party contains a complete synopsis of a witness' testimony, the document is identified by Bates stamp number or otherwise, and the location of the document is reasonably described, no additional synopsis is required to be disclosed, provided that the witness list refers to the matter as containing the synopsis. If a document contains a synopsis of only a portion of a witness' testimony, that document shall be identified as described above, but a synopsis must be provided to the opposing party setting forth any additional matter about which the witness is expected to testify.

IT IS SO ORDERED:

/s/
DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

U.S. v. al Qahtani
Pretrial Conference of 2 Mar 06

This pretrial conference was held at the request of and with the consent of the parties.

Present at this conference were the Presiding Officer (PO), LTC Broyles, Detailed Defense Counsel (DDC), and prosecutors, LT [REDACTED]

1. Prosecution requested an extension of their Discovery compliance deadline until 1 Apr 06. With the consent of the DDC, the extension will be granted in a separate filing.
2. The PO briefly reviewed the status of actions taken following the 13 Feb 06 Pretrial Conference to address Discovery issues. DDC indicated that he believed the Prosecution agreed to provide a matrix to clarify what information DDC is permitted to discuss with other defense counsel. DDC also reiterated that he did not consider delivery of a matrix to be a substitute for required disclosures. PO noted that, although the mechanism of a matrix document is not specifically referenced, the Prosecution's agreement to clarify the information is set forth in the summary of the 13 Feb 06 Pretrial Conference at pg. 2, ACTION 3.a. and b. Prosecution confirmed that they were working to clarify the information requested, but that a matrix might not be the optimum mechanism. Prosecution agreed to provide a matrix or other equally suitable document that will clarify the information requested by the DDC. No additional agreements were reached by the parties with respect to Discovery. DDC raised a matter he had intended to raise on 13 Feb 06: the prosecution has provided contact information for several prospective witnesses that includes only a reference that DDC is to contact the prosecution. DDC considers this inadequate. Prosecution replied that they do not presently have reliable or complete contact information for many, if not all, of those witnesses and that they will provide amplifying contact information as soon as it becomes available.
3. DDC raised the status of the prosecution response to his email request of 24 Feb 06. In that email, DDC requested four categories of information, including any additional statements by declarants whose statements the prosecution has already disclosed; and three categories of information related to allegations of government misconduct lodged by two former prosecutors. Prosecution declined to provide the requested information. No additional agreement was reached by the parties on this informal request.
4. The PO noted that the DDC failed to comply with his 28 Feb 06 deadline to meet Discovery requirements, contained in PO-2, paragraph 15 (RE 8), or to request additional time in which to respond. The PO also noted that DDC has failed to provide the 1 Mar 06 status update or to request leave to file it beyond the deadline. This update is a precondition of continuing the grant of delay requested by the DDC, which deferred the initial session and extended the deadline for his

compliance with the associated responsibilities set forth in RE 25. All counsel were admonished to meet all deadlines or to justify and request additional time in which to comply in advance of any deadline. When counsel are unsure of requirements, they were directed not to request clarification. DDC was directed to submit his status update by 1700 on 2 Mar 06 and to either comply with his Discovery obligations or to request relief from them by 1700 on 3 March 06.

5. DDC indicated that some of the points of contact for government witnesses had not been able to provide access to witnesses. As an example, DDC said the POC for FBI witnesses had not facilitated access to a "test" request for access to a specific agent-witness and that more than three weeks had passed since his request. DDC also noted that the original POC had recently been replaced by a new POC. No additional agreement was reached by the parties. However, the PO indicated that he expected the prosecution and the government agencies in possession of information and witnesses to ensure that disclosures made pursuant to the Discovery Order, or otherwise required, were accomplished in a meaningful manner and that included reasonable access to required witnesses.
6. DDC raised that he believed that the accused had been interviewed by CITF personnel after DDC was detailed to represent the accused on 1 Dec 05. Prosecution indicated that they believed that this may well have occurred, but that if an interview was conducted by law enforcement personnel from CITF, that it was done in error. Prosecution indicated that there was a mechanism, such as a list, by which law enforcement personnel were informed of which detainees had been assigned counsel and that the policy, as Prosecution understood it, was that law enforcement would not conduct interviews after counsel had been detailed. Prosecution indicated that there was an intelligence component within CITF that may have continuing authority to question accused detainees even after assignment of counsel. Prosecution indicated they would look further into this matter. No agreement was reached by the parties.
7. DDC indicated that he continued to be constrained in undertaking "representational" acts on behalf of the accused. The PO noted that the record in this matter does not contain anything submitted by the DDC that would support his status being other than that of the accused's properly qualified and detailed counsel. The DDC has not filed an ethics opinion from any authority and has not filed a motion to withdraw. DDC indicated that he had spoken to his bar, but agrees that he has not provided an ethics opinion from his state bar or from the Army "SOCO" that would limit his role. DDC indicated that, based on verbal advice he has received, he may not undertake "representational" activities. DDC said he would be relieved of the representational limitations he believes exist upon the occurrence of one of two events: 1) the accused affirmatively requests DDC to represent him; or 2) DDC is ordered by the PO to represent the accused.

8. Finally, the PO advised all counsel that today he will issue the Discovery Status Order that was discussed on 13 Feb 06. All counsel concurred with the dates proposed for their responding to the Discovery Status Order.

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

UNITED STATES OF AMERICA
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PO 5

ORDER
Representation by
Detailed Defense Counsel

7 March 2006

1. Pursuant to paragraphs 4.C.(2) and (4) of Military Commission Order No. 1, paragraphs 3.D.(2) and (3) of Military Commission Instruction No. 4, Detailed Defense Counsel (DDC) represent an accused upon being detailed.
2. On 1 December 2005, Lieutenant Colonel Bryan T. Broyles, Judge Advocate, U.S. Army, was detailed as Detailed Defense Counsel (DDC) in the above captioned case (RE 6) by Colonel Dwight H. Sullivan, U.S. Marine Corps Reserve, Chief Defense Counsel (CDC), pursuant to his authority contained in Sections 4.C. and 5.D. of Military Commission Order No. 1, dated August 31, 2005, and Section 3.B.(8) of Military Commission Instruction No. 4, dated September 16, 2005.
3. The said Lieutenant Colonel Brian T. Broyles, JA, USA, is hereby directed to immediately and zealously undertake and fully execute, within the bounds of the law, all duties and responsibilities of Detailed Defense Counsel in the above captioned matter, until such time as he is properly relieved by order of the Presiding Officer or other lawful authority.
4. If the DDC believes his representation of the accused is encumbered by ethical or other impediments, per Military Commission Instruction No. 4 and his detailing letter at RE 6, the DDC will first seek assistance from the CDC. If the impediment remains unresolved, DDC shall then file a motion and brief with the Presiding Officer, in accordance with POM 4-3, seeking such relief as the DDC believes is appropriate. See also Appointing Authority Regulation No. 3. In filing such a motion for relief, the DDC will provide legal authority establishing his position with respect to any conflict of interest or ethical, legal or other impediment. Until the DDC is relieved of his duty as Detailed Defense Counsel by competent authority, the DDC shall continue to represent the interests of the accused.
5. In the event the said Lieutenant Colonel Brian T. Broyles, JA, USA, is relieved of duty as Detailed Defense Counsel in this case by lawful authority other than the Presiding Officer, he is directed to immediately provide written notice to the Presiding Officer and to the prosecutors assigned to this matter. Notice shall identify the authority and the basis of his reassignment.

IT IS SO ORDERED

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

UNITED STATES OF AMERICA
v.
JABRAN SAID BIN AL QAHTANI
a/k/a Salam al Farsi
a/k/a Hateb
a/k/a Jabran al Qahtan
a/k/a Saad Wazar Hatib Jabran
a/k/a Jabran Saad Wazar Sulayman
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PO 5
CORRECTED COPY¹

ORDER
Representation by
Detailed Defense Counsel

7 March 2006

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5. In the event the said Lieutenant Colonel Bryan T. Broyles, JA, USA, is relieved of duty as Detailed Defense Counsel in this case by lawful authority other than the Presiding Officer, he is directed to immediately provide written notice to the Presiding Officer and to the prosecutors assigned to this matter. Notice shall identify the authority and the basis of his reassignment.

IT IS SO ORDERED

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

¹ The only correction is that the first name of the detailed defense counsel was spelled Brian in two places.

Hodges, Keith

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Wednesday, March 08, 2006 3:01 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Direction to Supplement - PO 1 J-US v. Al Qahtani: Defense Stat us # 1 March 2006
Attachments: FW: GBBQCA-ITINERARY FOR BROYLES, BRYAN; FW: GBBQCA-ITINERARY; Country Clearance Request for LTC Brian Boyles



FW: A-ITINERARY FOR EBBQCA-ITINERARY



FW:

Country Clearance Request for ...



1. Are the "purchased tickets" in hand? Who purchased them, and when were they purchased? There has been some change on this since the last update. I have changed the travel dates from 20 Mar to 21 Mar, and as a result the carrier has changed. The tickets were purchased through Carlson-Wagonlit travel. The most recent tickets were purchased today, 8 Mar. The previous tickets were originally ticketed on 24 February. (See attached emails).

2. You indicate "no action" has been taken on your country clearance request.

a. Provide the name of the point of contact for the country clearance and their phone number and email address. The POC on the country clearance in the Appointing Authority's office was [REDACTED] at [REDACTED]

b. Have you completed all documentation and other requirements for the request and provided them to the appropriate persons? If so, what was provided, to whom, and when? If not, what remains to be done by you, when were you told to accomplish it, why haven't you accomplished the requirement, and when will you do it? The request for country clearance is a form I provided to [REDACTED] above. I do not recall when it was provided, but it was at or before the first week of February. I do not yet have my passport, which is expected to be ready on 16 Mar. I also have an anti-terrorism briefing to attend on 14 Mar at 1200 at the Pentagon.

c. When was the last time you checked whether there has been "action on the request" or it had been approved? Whom did you ask, when did they tell you, and did they assure you that you had completed all the requirements on your end and provided them to the correct people? What explanations were given why the request has not been approved? I have had correspondence with TSGT [REDACTED] in Saudi Arabia, email attached, and some earlier correspondence with SFC [REDACTED]. The request takes a minimum of 30 days, and sometimes up to 60 days to process/approve. It was for this reason that I gave notice to the PO that I could not be ready before mid-April, even though I was "shooting for" a late March travel date. It appears from my contact with TSGT [REDACTED] that I will be able to travel the week anticipated, though I have pushed the date back by one day so that my travel begins on a Tuesday instead of a Monday. This is due in part to the work schedule in Saudi, where the weekend is Thursday/Friday. This will allow one working day overlap before travel begins to make last minute adjustments.

3. Have you been informed by anyone that there is anything else other than country clearance that you need to provide in order to make the trip to Saudi Arabia (passports, immunizations, health certificates or the like)? If so, who told you, when did they tell you, what did they tell you, and what is the status of your compliance? I do not yet have my passport, which is expected to be ready on 16 Mar. I also have an anti-terrorism briefing to attend on 14 Mar at 1200 at the Pentagon. There are no other requirements I have been made aware of.

RE 43 (al Qahtani)

Page 1 of 11

4. What contact have you had with the accused's family since your 15 Feb status report? If you have not contacted them, why have you not done so? If you have contacted the accused's family, please indicate generally what was discussed regarding your trip and any other general information related to facilitating an attorney-client relationship with the accused. I have had email contact with the family regarding the attitude of the family generally to my visit/representation of Mr. Al Qahtani. The family is wants to meet me and assist me. (TSGT [REDACTED]) indicates that I will not be allowed to visit the family in their home, but we haven't discussed that in detail yet. I am still attempting to meet the family at their home, given the nature of the what I am seeking from them.

5. Indicate whether you now anticipate any other defense counsel joining the defense team. Provide any names, if known. I do not now anticipate any other defense counsel joining the defense team. I will have a paralegal assigned in April.

-----Original Message-----

From: Hodges, Keith H. CTR OMC

[mailto:Keith.H.Hodges@REDACTED]

Sent: Saturday, March 04, 2006 10:19

To: [REDACTED]

Subject: Direction to Supplement - PO 1 J -US v. Al Qahtani: Defense Stat us # 1 March 2006

LTC Broyles,

1. In the future when you are asked to number paragraphs, use numbers and not numerically descriptive nouns. I believe you know exactly why numbering is helpful, and using numerically descriptive nouns is simply not as helpful as numbers. In addition, do not in future status reports incorporate by reference information, but provide them in the report itself.

2. The Presiding Officer is concerned that one might believe that simply making a request is sufficient to have made progress or complete a necessary step. It is not. Making a request, ensuring it is complete, checking on the status, and fulfilling all requirements to convert a request into a completed action requires constant effort. While the answers to these questions might be in the hands of others, the Presiding Officer looks to you to provide the response so that both the "action officer" and you have the same information.

3. The Presiding Officer has directed that supplement your PO 1 J Update with the following information NLT 8 March 2006.

4. Are the "purchased tickets" in hand? Who purchased them, and when were they purchased?

5. You indicate "no action" has been taken on your country clearance request.

a. Provide the name of the point of contact for the country

RE 43 (al Qahtani)
Page 2 of 11

clearance and their phone number and email address.

b. Have you completed all documentation and other requirements for the request and provided them to the appropriate persons? If so, what was provided, to whom, and when? If not, what remains to be done by you, when were you told to accomplish it, why haven't you accomplished the requirement, and when will you do it?

c. When was the last time you checked whether there has been "action on the request" or it had been approved? Whom did you ask, when did they tell you, and did they assure you that you had completed all the requirements on your end and provided them to the correct people? What explanations were given why the request has not been approved?

6. Have you been informed by anyone that there is anything else other than country clearance that you need to provide in order to make the trip to Saudi Arabia (passports, immunizations, health certificates or the like)? If so, who told you, when did they tell you, what did they tell you, and what is the status of your compliance?

7. What contact have you had with the accused's family since your 15 Feb status report? If you have not contacted them, why have you not done so? If you have contacted the accused's family, please indicate generally what was discussed regarding your trip and any other general information related to facilitating an attorney-client relationship with the accused.

8. Indicate whether you now anticipate any other defense counsel joining the defense team. Provide any names, if known.

Keith Hodges
Assistant to the Presiding Officers

> -----Original Message-----

> From: Broyles, Bryan T LTC OMC

> Sent: Thursday, March 02, 2006 11:26 AM

> To: Otoole, Daniel E CAPT OMC

> Cc:

> Subject: PO 1 J -US v. Al Qahtani: Defense Status # 1 March 2006

> Sir,

> Below is the status report that was scheduled for 1 March 2006.

> First, regarding travel to Saudi Arabia. As before, tickets have

RE 43 (al Qahtani)
Page 3 of 11

> been purchased and the request for country clearance is complete, but
> no action has been taken on the request. Anticipated (and ticketed)
> travel is for 20 - 28 March.
>
> Second, I met the accused again on 1 March. My status with the
> accused remains unchanged.
>
> Third, I have made limited progress in investigating the accused's
> case without his assistance. I have reviewed the government's limited
> disclosure to the extent possible, and have attempted to contact some
> witnesses listed by the government, but have not been able to contact
> those witnesses.
>
> Fourth, my status regarding obtaining the cooperation of the accused
> has not changed in a way that would change the anticipated trial
> session dates listed in the 15 February update.
>
> LTC Broyles
>
>

Hodges, Keith

From: [REDACTED]
Sent: Friday, February 24, 2006 8:37 AM
To: Broyles, Bryan, LTC, DoD OGC
Subject: FW: GBBQCA-ITINERARY FOR BROYLES, BRYAN
Attachments: GBBQCA.TXT



GBBQCA.TXT (4 KB)

[REDACTED] Updated reservations with hotel information included is attached. Info also forwarded to SFC

-----Original Message-----

From: CWGTGovernment [mailto:CWTGovernment@Carlson.com]
Sent: Friday, February 24, 2006 08:20
To: [REDACTED]
Subject: GBBQCA-ITINERARY FOR BROYLES, BRYAN

*** This is an out-going email address only, please do not reply ***

GBBQCA (2)

YOUR CARLSON WAGONLIT CONFIRMATION CODE IS GBBQCA

SALES PERSON: 42

ITINERARY

DATE: 09 FEB 06

GBBQCA PAGE: 01

TO: PICKUP PAPER TICKET 17MAR.RETURN ANY UNUSED TICKETS
WITH 3 COPIES OF ORDERS TO
CARLSON WAGONLIT TRAVEL
[REDACTED]

FOR: BOYLES/BRYAN

YOUR AIRFARE ON 09FEB AT 1000 IS 2065.90
**PLEASE VISIT OUR WEBSITE AT WWW.CWGOVERNMENT.COM
**AND COMPLETE OUR SERVICE EXCELLENCE SURVEY.
*****TRAVEL ORDER MUST BE RECEIVED BY CWT*****
*****BEFORE A TICKET CAN BE ISSUED*****
PLEASE CHECK VIRTUALLYTHERE.COM FOR ETKT RECEIPT

21 MAR 06 - TUESDAY
AIR UNITED AIRLINES FLT:8826 ECONOMY MULTI MEALS
WASHINGTON DULLES-FRANKFURT OPERATED BY LUFTHANSA
LV WASHINGTON DULLES 605P EQP: BOEING 747 400
07HR 35MIN

22 MAR 06 - WEDNESDAY
AR FRANKFURT 740A NO -STOP
ARRIVE: TERMINAL 1 REF: WRVXGC
BOYLES/BRYAN SEAT-54D
AIR LUFTHANSA FLT:632 ECONOMY MEALS
LV FRANKFURT 1010A EQP: AIRBUS A330-300
DEPART: TERMINAL 1 05HR 25MIN
AR RIYADH 535P NON-STOP
ARRIVE: TERMINAL 1 REF: YX9DUF
BOYLES/BRYAN SEAT-46G

28 MAR 06 - TUESDAY
AIR LUFTHANSA FLT:633 ECONOMY MEALS
LV RIYADH 100A EQ: AIRBUS A330-300
DEPART: TERMINAL 1 06HR 05MIN
AR FRANKFURT 605A NON-STOP
ARRIVE: TERMINAL 1 REF: YX9DUF
BOYLES/BRYAN SEAT-46G
AIR UNITED AIRLINES FLT:8832 ECONOMY MULTI MEALS
FRANKFURT-WASHINGTON DULLES OPERATED BY LUFTHANSA
LV FRANKFURT 1025A EQP: AIRBUS A340-300
DEPART: TERMINAL 1 08HR 50MIN
AR WASHINGTON DULLES 1215P NON-STOP
RE : WRVXGC
BOYLES/BRYAN SEAT-44H
[REDACTED]

FOR: BOYLES/BRYAN

24 SEP 06 - SUNDAY
OTHER INFORMATION

GBBQCA (2)
THANK YOU FOR CALLING CARLSON WAGONLIT TRAVEL

CARRY YOUR TRAVEL ORDERS TO ENSURE GOVT RATES.
...TRAVEL ORDERS MUST BE PROVIDED TO CARLSON WAGONLIT
...BEFORE AIRLINE TICKETS CAN BE ISSUED.
RESERVED SEATS SUBJECT TO CANCEL 30MIN PRIOR TO FLIGHT
FOR BAGGAGE RESTRICTIONS CHECK SPECIFIC AIRLINES
YOUR PERSONAL ID CODE IS SVZ30/NCR
THANK YOU FOR BOOKING WITH CARLSON WAGONLIT TRAVEL
FOR ENROUTE OR EMERGENCY ASSISTANCE DURING NORMAL
BUSINESS HOURS 800A-430P PLEASE CALL 800-756-6111
FAX ORDERS TO LOCAL OFFICE AT 703-486-9244
AFTER NORMAL BUSINESS HOURS FOR EMERGENCY ASSISTANCE
PLEASE CALL TOLL FREE 800-383-6732
FOR REPORTING OR EVALUATING SERVICE EXCELLENCE ISSUES
CALL 1-877-463-6298 YOUR QC ID CODE IS 4131.A
.....
CAR DECLINED/A//09FEB
FARE-A42 QMZ

Carlson Wagonlit Travel - Local Presence, Global Power

Hodges, Keith

From: [REDACTED]
Sent: Thursday, February 09, 2006 11:15 AM
To: Broyles, Bryan, LTC, DoD OGC
Cc: [REDACTED]
Subject: FW: GBBQCA-ITINERARY
Attachments: GBBQCA.TXT



GBBQCA.TXT (4 KB)

LTC Broyles,

The itinerary for your travel to Saudi Arabia is attached. If this does not meet with your satisfaction, I will make whatever changes you request. You will be issued a "paper" ticket which must be pick-up from Carlson NLT 23 Feb. If changes are necessary, I will need to make them prior to that date.

If you desire to travel from Washington on 20 Mar so you actually arrive in Saudi Arabia on 21 Mar instead of 22 Mar, I will make that change immediately.

[REDACTED]
Chief Administrative Manager
Office of Chief Defense Counsel
Office of Military Commissions
[REDACTED]

This communication may be privileged as attorney work product and/or attorney-client communication or may be protected by another privilege recognized under the law. Do not distribute, forward, or release without the prior approval of the sender or DoD OGC Office of Military Commissions, Office of Chief Defense Counsel. In addition, this communication may contain individually identifiable information the disclosure of which, to any person or agency not entitled to receive it, is or may be prohibited by the Privacy Act, 5 U.S.C. 552a. Improper disclosure of protected information could result in civil action or criminal prosecution.

-----Original Message-----

From: CWGTGovernment [mailto:CWGTGovernment@Carlson.com]
Sent: Thursday, February 09, 2006 11:04
To: [REDACTED]
Subject: GBBQCA-ITINERARY

*** This is an out-going email address only, please do not reply ***

RE 43 (al Qahtani)
Page 8 of 11

GBBQCA

YOUR CARLSON WAGONLIT CONFIRMATION CODE IS GBBQCA

SALES PERSON: 42

ITINERARY

DATE: 24 FEB 06

GBBQCA PAGE: 01

TO: PICKUP PAPER TICKET 17MAR.RETURN ANY UNUSED TICKETS
PICKUP PAPER TICKET 22FEB.WITH 3 COPIES OF ORDERS TO
[REDACTED]

FOR: BROYLES/BRYAN

YOUR AIRFARE ON 24FEB AT 0713 IS 2999.70
**PLEASE VISIT OUR WEBSITE AT WWW.CWGOVERNMENT.COM
**AND COMPLETE OUR SERVICE EXCELLENCE SURVEY.
*****TRAVEL ORDER MUST BE RECEIVED BY CWT*****
*****BEFORE A TICKET CAN BE ISSUED*****
PLEASE CHECK VIRTUALLYTHERE.COM FOR ETKT RECEIPT

20 MAR 06 - MONDAY
AIR UNITED AIRLINES FLT:936 ECONOMY MULTI MEALS
LV WASHINGTON DULLES 602P EQP: BOEING 767 300
08HR 08MIN

21 MAR 06 - TUESDAY
AR ZURICH 810A NON-STOP
RE: WRVXGC

AIR BROYLES/BRYAN SEAT-16C
SWISS FLT:228 ECONOMY MULTI MEALS
LV ZURICH 1240P EQP: AIRBUS A330-200
05HR 20MIN

AR RIYADH 800P NON-STOP
ARRIVE: TERMINAL 1 REF: T3DC5Y

OTHER SEAT
AISLE SEAT BEST AVAILABLE AT TIME OF BOOKING, PLEASE RE-
CHECK AT GATE FOR BETTER SELECTION.

HOTEL RIYADH OUT-28MAR
HOLIDAY INN 7 NIGHTS
HOLIDAY INN RIYADH MINHAL 1 ROOM STADARD ROOM
OLD AIRPORT ROAD 17058
11484 RIYADH SAUDI ARABIA RATE-395.00SAR PER NIGHT
FONE 0096614782500 CANCEL BY 06P DAYOF ARRIVAL
FAX 0096614772819
GUARANTEED LATE ARRIVAL
CONFIRMATION 63050881

OTHER RIYADH
CNXL B/4 1800 LOCAL HTL TIME 21MAR

FOR: BROYLES/BRYAN

28 MAR 06 - TUESDAY
AIR LUFTHANSA FLT:633 ECONOMY MEALS
LV RIYADH 100A EQP: AIRBUS A330-300
DEPART: TERMINAL 1 06HR 05MIN
AR FRANKFURT 605A NON-STOP

Page 1

RE 43 (al Qahtani)
Page 9 of 11

	GBBQCA		
AIR	ARRIVE: TERMINAL 1		REF: ZXUW3C
	UNITED AIRLINES	FLT:8832 ECONOMY	MULTI MEALS
	FRANKFURT-WASHINGTON DULLES OPERATED BY LUFTHANSA		
	LV FRANKFURT	1025A	EQ : AIRBUS A340-300
	DEPART: TERMINAL 1		08HR 50MIN
	AR WASHINGTON DULLES	1215P	NON-STOP
			REF: WRVXGC
	BROYLES/BRYAN SEAT-44H		

24 SEP 06 - SUNDAY
 OTHER INFORMATION
 THANK YOU FOR CALLING CARLSON WAGONLIT TRAVEL

CARRY YOUR TRAVEL ORDERS TO ENSURE GOVT RATES.
 ...TRAVEL ORDERS MUST BE PROVIDED TO CARLSON WAGONLIT
 ...BEFORE AIRLINE TICKETS CAN BE ISSUED.
 RESERVED SEATS SUBJECT TO CANCEL 30MIN PRIOR TO FLIGHT
 FOR BAGGAGE RESTRICTIONS CHECK SPECIFIC AIRLINES
 YOUR PERSONAL ID CODE IS SVZ30/NCR
 THANK YOU FOR BOOKING WITH CARLSON WAGONLIT TRAVEL
 FOR ENROUTE OR EMERGENCY ASSISTANCE DURING NORMAL
 BUSINESS HOURS 800A-430P PLEASE CALL 800-756-6111
 FAX ORDERS TO LOCAL OFFICE AT 703-486-9244
 AFTER NORMAL BUSINESS HOURS FOR EMERGENCY ASSISTANCE
 PLEASE CALL TOLL FREE 800-383-6732
 FOR REPORTING OR EVALUATING SERVICE EXCELLENCE ISSUES
 CALL 1-877-463-6298 YOUR QC ID CODE IS 4131.A

 CAR DECLINED/A//09FEB
 FARE-A42 QMZ

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Hodges, Kelth

From: [REDACTED]
Sent: Saturday, March 04, 2006 12:24 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: Country Clearance Request for LTC Brian Boyles
Importance: High

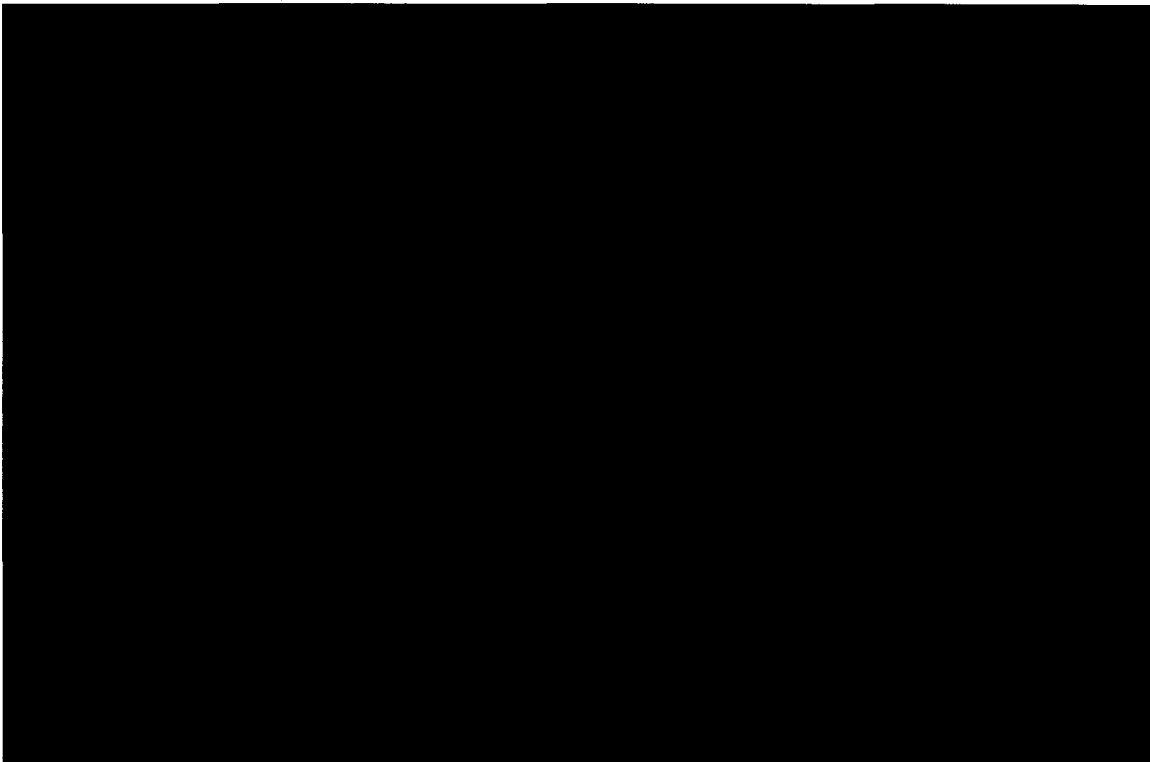
Sir,

I received a country clearance on you for 21-28 Mar 06. Do you have a DOD in country POC? It's was also mentioned that you have reservations at the Holiday Inn in town. Do to security reasons you would need to stay on Eskan Village. Please respond as soon as possible so I may assist you if necessary.

Thank you.

v/r

//SIGNED//



RE 43 (al Qahtani)
Page 11 of 11

UNITED STATES OF AMERICA

v.

JABRAN SAID BIN AL QAHTANI

PROSECUTION

Response to Presiding Officer's
Discovery Status Order of 2 March 2006

10 MARCH 2006

1. This report is being filed by the prosecution pursuant to the Presiding Officer's Discovery Status Order of 2 March 2006. In his Discovery Status Order the Presiding Officer directed the prosecution to provide a succinct summary of the manner in which the prosecution has complied to date with the individual subparts of paragraph 14 of the Discovery Order of 21 December 2005 (PO-2). The Discovery Status Order further required that the prosecution include all actions taken to comply with any discovery deadline extended at the prosecution's request.
2. To date the prosecution has requested two extensions on the Discovery Order, both of which were approved by the Presiding Officer. The prosecution's first request was made on 26 January 2006 and its second request was made on 28 February 2006. The current deadline for discovery has been extended to 1 April.
3. Prior to delving into how it has complied with subparts of Paragraph 14, the prosecution deems it necessary to articulate its positions regarding discovery and to explain the process that is required of the prosecution by the originators of the evidence. These explanations are for the purpose of giving all parties involved a better understanding of how the process, as it currently exists, works.
4. Nearly all of the evidence to be used in every military commission case is not generated by the Office of the Chief Prosecutor and remains the property of the originating agency. Another way of saying this is that the evidence is "ORCON" or "Originator Controlled." For all of the evidence that is considered "ORCON," the Office of Military Commissions must request approval to use the evidence in court, turn it over to cleared defense counsel, and must abide by any caveat the agency puts on its use and disclosure. Although the prosecution has *access* to this evidence prior to making a charging determination, requests for approval to use the materials in a commission case is a separate process that has traditionally been made after a case has been referred to military commission, so that the responding agencies may properly prioritize many pending requests it has from many different agencies.
5. Prior to December 2005, when the above-referenced discovery order and four other discovery orders were given on referred commission cases, the guidance that the Office of Military Commissions was working under regarding discovery timelines was found in

Military Commission Instruction No. 8, dtd 16 September 2005.¹ MCI No. 8 requires that copies of all evidence intended for use at trial be delivered to the defense at least one week prior to the convening of a military commission. MCI No. 8 also requires that the prosecution provide access to evidence known to the prosecution that tends to exculpate the accused *as soon as practicable*, and in no instance later than one week prior to the scheduled convening of a military commission. *See MCI No. 8*. While there is little doubt that the Presiding Officer has the authority to require disclosure sooner than seven days prior to the convening of a military commission (see MCI No. 8 Para 6), the process undertaken by the other agencies has not, to this point, become efficient enough to respond to prosecution requests in a matter of 30-45 days.

6. Prior to November 2005 there were a total of four cases referred to trial by Military Commission, all of which, after November of 2004, were under a judicial stay; either by a federal court or voluntarily by the Appointing Authority. The releasing of discovery in those four cases was an ongoing process that began 18 December 2003. The various agencies had put in place certain processes to respond to the various OMC requests on those first four referred cases, and the amount of time these agencies had to respond allowed for those processes to be adequate.

7. Between 23 November 2005 and 16 December 2005 the number of referred cases before military commissions more than doubled, to a total of nine. The tenth commission case, *United States v Zahir*, was referred on 18 January 2006. With the recent six referrals, first-of-their-kind Discovery Orders were issued requiring discovery disclosure anywhere from seventeen days after the order to thirty nine days after the order.

8. Because of where the accused was captured in the instant case, many agencies are involved in the discovery process, including the Department of Defense Criminal Investigation Taskforce ("CITF"), the Federal Bureau of Investigation ("FBI"), the United States Central Command ("CENTCOM"), the United States Southern Command ("SOUTHCOM"), United States Army Intelligence Command ("INSCOM"), Defense Intelligence Agency ("DIA"), Department of Justice "DOJ" and other governmental agencies ("OGA"). This requires at least eight different OMC requests to eight different agencies, which then must staff those requests accordingly.

9. While the processes these agencies had put in place worked for the first four cases, the reality is that the number of referred cases (and their attendant requests) more than doubled in less than a month. This was coupled with the fact that deadlines established by the Presiding Officers required completion of discovery in a little over a month. This increased demand and new deadlines have caused certain agencies to develop, for lack of a better word, a bottle-neck in their systems. The same agencies, and the same people within those agencies, must be coordinated with in almost every military commission case. While the Office of the Chief Prosecutor, along with these various agencies, will have to adjust our processes to the time demands for any future discovery requests, this explanation was given so one can understand why it has taken some time for these

¹ The first version of MCI No. 8 was dated 30 April 2003, and is the same regarding disclosure and discovery.

agencies to be able to adjust to the new realities of the demands now required of them, and, in turn, why OMC-P has needed to request extensions for discovery deadlines. As the process moves forward all parties involved should become more efficient in the handling of requested documents.

10. The prosecution in the case of the *United States v al Qahtani* has made requests to all of the above-named agencies. These agency discovery requests were consolidated with the cases of *United States v al Sharbi* and *United States v Barhoumi*, notwithstanding the fact that these cases were referred separately and are currently scheduled to be tried separately. The consolidation of requests was done because these individuals are named co-conspirators, and the nature of the charges specifically, and conspiracy law generally, makes evidence against any one of the accused relevant to all the accused; and therefore discoverable. To date, all three counsel have received identical evidence in the prosecution's discovery disclosure and it is the prosecution's intent to keep the discovery identical throughout the process on all three cases.

11. The following agency discovery requests have been made in the case of *United States v al Qahtani*:

- a. On 18 November the prosecution requested FBI fingerprint certain items of evidence. The results of the fingerprinting analysis are still pending.
- b. On 2 December 2005 a request was made to the FBI for approval to use and turn over to the defense over one hundred and thirty FD-302s. This request also asks the FBI to search its central database to ensure that OMC has all of the law enforcement statements regarding the accused. This search did turn up additional documents other than those specifically requested. This request is substantially completed by FBI, but now requires further redaction of certain U.S. persons and U.S. companies mentioned in various FD-302s pursuant to FBI policy. Once these last redactions are made, the FBI will give final approval to release the statements to the defense.
- c. On 20 January 2006, after a lengthy review of all documents in the OMC/CITF database, the prosecution identified nine additional documents in its database, and made an additional request to the FBI. These documents will be released with the other documents to be released by the FBI.
- d. On 24 January 2006 a request went to the U.S. Army Intelligence and Security Command (INSCOM), requesting declassification of specified documents, permission to turn over the specified documents to properly cleared defense counsel, and permission to use the documents at a military commission. On 30 January 2006 INSCOM approved for release five documents, however, the documents remained almost entirely classified. After obtaining approval to release these documents the prosecution attempted to release the classified documents to LTC Broyles, but was told he did not have the ability to store them, but that OMC-D was in the process of obtaining safes to secure classified

documents. To date, while these documents are available for the defense to review in OMC-P spaces, they have not been released to the defense. As soon as we are notified by LTC Broyles that his office has the capability to secure classified information these documents will be turned over. Of course, LTC Broyles can contact the prosecution if he wants to review and inspect these documents in our spaces in the mean time.

- e. On 20 January 2006 a request went to the United States Southern Command (SOUTHCOM) requesting declassification of specified documents, permission to turn over the specified documents to properly cleared defense counsel, and permission to use the documents at military commission. This was the most lengthy of the requests to any of the DoD components and the response is still pending. This request includes over one hundred and fifty documents.
- f. On 20 January 2006 a request went to the United States Central Command (CENTCOM) requesting declassification of specified documents, permission to turn over the specified documents to properly cleared defense, and permission to use the documents at military commission. On 7 February U.S. Army INSCOM determined that they could handle this request in lieu of CENTCOM and approved the release of classified documents on 21 February 2006.
- g. There are two different Grand Jury transcripts that we believe may require further DOJ approval to disclose to the defense. This request to DOJ request has been made, and although we believe the prosecution has approval to *have* this testimony pursuant to Federal Rule of Criminal Procedure 6(E), out of abundance of caution, we are assuring we also have approval to turn it over to the defense and use it in the commission proceedings prior to releasing it in discovery. This request for clarification is still pending.
- h. There were over one hundred and sixty physical items of evidence that were seized from the house upon the accused's capture. They are all currently classified, however we have requested, and hope to receive approval to declassify all of the physical evidence, in the near future. Certain items in this group of evidence are currently at the FBI Lab in Quantico being analyzed for fingerprints. We have photographs and translations of all of the pieces of evidence, and plan on turning the photographs and translations over to the defense as soon as the items are declassified and/or the prosecution has approval to turn the items over to the defense.
- i. The Combatant Status Review Tribunals for al Qahtani, al Sharbi and Barhoumi were recently obtained by OMC-P and, by the time of this response, should have been released to defense counsel.

12. Having given an explanation of the discovery process and the prosecution requests to date in the case of the *United States v. al Qahtani*, the prosecution responds to the

specific subparts of Paragraph 4 below. The prosecution response will be in italicized in bold below each subpart:

The Subparts of paragraph 14 are as follows:

- a. Evidence and copies of all information the prosecution intends to offer at trial.
 1. *The prosecution has released over fifteen hundred pages of evidence that it may use at trial. There is additional evidence, both documentary and physical, that is still pending approval (as detailed above) and has not yet been released.*
- b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.
 1. *The prosecution has turned over its witness list in the case, which includes 46 witnesses. The prosecution believes it has satisfied its requirement to provide an adequate summary of expected witness testimony. Every FBI witness has a point of contact in the FBI who must be coordinated with for pre-trial access to the witness. It is important to note that this is more access than FBI typically gives defendants in federal courts to its witnesses before trial. Approximately seven of the witnesses have contact information that reads; "attempts to contact these individuals should be made through the prosecution." This response is due to the fact that the prosecution either does not have current contact information or would need to take additional steps in order to facilitate the defense to speak with the witness. The prosecution will continue to provide contact information as it becomes available.*
- c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.
 1. *The prosecution does not currently intend on calling any expert witnesses in this case at this time, but reserves the right to do so in the future. Any required disclosures would be made by the prosecution at that time.*
- d. Exculpatory evidence known to the prosecution.
 1. *The prosecution has searched for, and continues to search for, any evidence which may tend to exculpate the accused. Some of the requests that remain pending include evidence that may be exculpatory to the accused. Such evidence will be turned over when the prosecution is permitted to do so.*
- e. Statements of the accused in the possession or control of the Office of the Chief

Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.
 - a. ***The prosecution has or will, pending approval, release all such documents.***
2. Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.
 - a. ***The prosecution has no knowledge of any such statements by the accused.***
3. Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.
 - a. ***The prosecution interprets this requirement to release all of the statements given by the accused to either an agent of CITF or FBI. All of the known CITF statements of the accused have been disclosed to the defense. All of the known FBI statements of the accused are pending release approval, and will be released to the defense in due course.***
4. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:
 - (1.) Sworn to, written or signed by, the witness.
 - (2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.
 - (3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

The prosecution is currently awaiting final DoJ approval on sworn grand jury testimony of one of its witnesses. The prosecution is also attempting to ascertain if the same individual has testified since the prosecution's initial determination on required disclosure. Also, one of the other named witnesses just testified for the government in the case of the United States v Moussaoui and his testimony will be turned over once made available.

13. The discovery status order also requires the prosecution to detail any actions taken to comply with any discovery deadline extended. All of the prosecution's requests to the various agencies were made prior to the first deadline on the original discovery order. Any subsequent action taken by the prosecution since the time

of the requests has been to get periodic updates on the status of the requests, which are now in the hands of the other agencies.

14. Finally, the Discovery Order requests that the prosecution describe any other actions the prosecution has taken to resolve detailed defense counsel requests, concerns, or objections to the manner in which the prosecution has disclosed information, including matters addressed in the summary of 8-5 conference of 13 February 2006. The following was agreed to by the prosecution on 13 February:

- a. Clarify the administrative process necessary for defense counsel to obtain access to protected information, specifically including the requirements for signing of a non-disclosure agreement. Advise the detailed defense counsel and the APO.
 - i. *The prosecution believes that the non-disclosure agreement is signed by anyone who gets a clearance from the United States to have access to classified information. The prosecution does believe that this position was raised in one of the 8-5s, but has done nothing further to notify the defense counsel or the APO on this issue.*
- b. Compare protective orders in other cases and clarify the position of the prosecution as to whether those orders adequately protect information disclosed to detailed defense counsel in this case in the event he discusses that information with other defense counsel to whom the common information has been disclosed under another case protective order. Advise the detailed defense counsel and the APO.

The prosecution's position is that any defense counsel who has the information already from discovery released in their own cases would fall under their own protective orders. But those who do not have the information are not subject to the protective orders in this case and do not have an official need to know. This has been the prosecution's position from the beginning on this issue, and this position remains consistent throughout all of the prosecution's positions on released discovery and the prosecution's proposed protective orders.

- c. Propose to detailed defense counsel wording for a modified Protective Order

The prosecution's position on the amended protective orders was set forth in an email to LTC Broyles on 10 February 2006. This included allowing for the accused to view unredacted copies. The prosecution's position has not changed from its proposed protective orders on that date.

d. Regarding the witness matrix that the prosecution agreed to turn over to the defense, the prosecution attempted to deliver to LTC Broyles on 13 February a list of all the agents, both FBI and CITF, which can be found on the CITF Form 40s released to him in discovery. This list was refused by LTC Broyles because LTC Broyles took the position that he wanted unredacted copies of the documents instead. The prosecution does not intend to re-serve the defense this matrix unless requested to do so by the defense. There will be an additional matrix regarding the FD-302s once FBI approves the use of the requested 302s. There has been no change to date on the FBI's desire to have their agents redacted on the CITF Form 40s or the FD-302s. The prosecution has released to LTC Broyles CITF Forms 40s with CITF agent's names unredacted, but the FBI Agents names remain redacted. If the prosecution represented that the defense could view completely unredacted versions of the CITF Form 40s, including the names of the FBI Agents, it did so in error. While the matrix would have made it possible for the defense to know exactly what agents, both CITF and FBI, are present on what documents, the defense's refusal to accept that document has prohibited the defense from knowing the FBI agents names, and to what interview those names correspond.

e. The prosecution has also agreed to release a database report listing the document name and the corresponding bates stamp numbers of the evidence that was released to the defense in discovery. This should enable the defense to ascertain, with other defense counsel, whether they have the same piece of discovery to be able to discuss the material. This report should be released on 10 March 2006.

f. The prosecution did provide a technical consultant to work with the detailed defense counsel on 15 February to discover whether the .pdf file previously provided was damaged and therefore not searchable. It was damaged, and the file has been re-served in a searchable format.

g. Regarding contact information for witnesses, the prosecution is unaware of any pending requests by the defense for contact information the prosecution currently has. The prosecution is aware of a request for some witnesses' contact information that it does not currently have contact information for. As the prosecution is able to get additional contact information for certain witnesses it will be provided in due course.

/S/

[REDACTED]
LT, JAGC, USN

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Wednesday, March 15, 2006 3:35 PM
To: Broyles, Bryan, LTC, DoD OGC; daniel.o'toole@navy.mil
Cc: [REDACTED]

Subject: RE: PO 1 J - US v. Al Qahtani - Defense Status # 15 March 2006

Thank you.

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Wednesday, March 15, 2006 1:27 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: PO 1 J - US v. Al Qahtani - Defense Status # 15 March 2006

1. Travel to Saudi Arabia is now scheduled for 23 - 30 March 2006. I will land in Saudi Arabia on Friday, 24 March at 0740. I anticipate an initial meeting with the accused's brother on 25 March, and will schedule meetings with the rest of the family at their convenience.
2. Security concerns dictate that I am not allowed to meet in the residence of the accused's family. I am attempting to obtain an exception to this, given the nature of my visit and its primary purpose.
3. I was originally booked to stay at an off-installation hotel, but security concerns require I stay at the embassy housing area.
4. My passport is complete, and the visa office indicates the visa will be approved by Thursday, 16 March. Country clearance was received on 10 March, but is now being amended to reflect three changes: Travel dates, accommodations and a request for assistance in the form of a driver/escort. These changes are clerical/administrative, and should not require separate approval. The changes were made at the direction of the Saudi Embassy's security detachment.
5. In light of the recently issued trial calendar, my schedule is as follows:
 - a. Return from Saudi Arabia on 30 March, a Thursday. I arrive at 1215 in the afternoon.
 - b. Travel to Guantanamo Bay, Cuba on or about 17 April, to meet with Mr. Al Qahtani, and begin working with him on his defense.
 - c. Appear before the commission for its initial hearing the following week.

RE 45 (al Qahtani)
Page 1 of 2

6. There is no other attorney on this case, nor is it expected that one will join the defense team. The defense team paralegal is scheduled to arrive on 1 April, and will travel to Cuba with me for both the preparation week and the trial week.

Bryan Broyles
LTC, JA


Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Friday, March 17, 2006 7:54 AM
To: [REDACTED]

Subject: RE: US v. Al Qahtani, PO 2 - F

1. Thank you for your response.
2. So there is no misunderstanding, the purpose of the Discovery Status Order was to keep the Presiding Officer advised of the progress of the preparation of the parties. It was neither intended, nor is it, a vehicle for counsel to request relief of the Presiding Officer. As has been noted many times, to include PO 4, the only way to request relief from the Presiding Officer is to file a motion in accordance with POM 4-3 (or a special request for relief under the limited circumstances when that is permissible under POM 4-3.) The Discovery Status Order responses are not requests for relief, and therefore not before the Presiding Officer as a matter to resolve.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Wednesday, March 15, 2006 2:59 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: US v. Al Qahtani, PO 2 - F

<<defensediscoverystatus.doc>>

<<Al Qahtani Witness List.pdf>>

Bryan Broyles
LTC, JA
[REDACTED]

UNITED STATES OF AMERICA

v.

JABRAN SA'AD BIN AL QAHTANI

Detailed Defense Counsel's
Reply to Prosecution Response to
Presiding Officer's Discovery Status
Order of 2 March 2006

15 MARCH 2006

1. This reply is being filed by the defense within the time frames and guidance established by the Presiding Officer's Discovery Status Order of 2 March 2006.

2. Regarding paragraph 2 of the Prosecution Response, DDC concurs, with a caveat. The discovery deadline for production to DDC was 31 January 2006, except for information the prosecution is seeking to have declassified. No other extensions have been requested or granted. Regarding paragraphs 3 through 11, DDC has insufficient knowledge to either agree or disagree with the characterization of the prosecution.

3. The following lettered paragraphs will coincide with the subparagraphs utilized in paragraph 12 of the prosecution status update.

12. a. DDC concurs.

12. b. DDC does not concur. The prosecution fails to note that it did not timely serve the witness list. Additionally, the prosecution incorrectly states both what was ordered and what it provided, to wit: ***"The prosecution believes it has satisfied its requirement to provide an adequate summary of expected witness testimony."*** The order required the prosecution to provide not a summary, but rather a synopsis, "that which the requesting counsel has a good faith basis to believe the witness will say, if called to testify. A synopsis shall be prepared **as though the witness were speaking (first person), and shall be sufficiently detailed as to demonstrates both the testimony's relevance and that the witness has personal knowledge** of the matter offered. *See* Enclosure 1, POM 10-2, for some suggestions." (Emphasis added) POM 10-2 further clarifies that a "summary" is not sufficient, stating, *"Note: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered."* Enclosure 1, POM 10-2 states,

3. A proper synopsis serves many purposes:

- a. It makes clear what the witness will say - **not just the subject or topic of the witness's testimony.**
- b. It describes how the witness is necessary and how the offered testimony is

relevant. The parties may agree concerning what a witness will say, but that doesn't mean that the witness is necessary or the testimony relevant. (Relevant being shorthand here for the reasonable person standard in the President's order.)

c. It permits a realistic opportunity to obtain a satisfactory alternative to the testimony. If the parties agree what a witness will say and that it is relevant, they may agree to a stipulation or other ways for the party to present the testimony. This could be a safeguard for a defense-requested witness who later becomes unavailable.

d. It ensures that the Presiding Officer has sufficient facts to make a decision. The PO knows nothing about the case. (Emphasis added)

The prosecution has provided, at best, a reference to what the subject matter of the testimony will be, but in most cases, not even that. The use of the phrase, "Witness will testify consistent with the statements this agent was present for that have been, or will be, provided to the defense," occurs for seventeen out of forty-six witnesses. In no case has the use of the first person been employed, nor has anything beyond the subject of the testimony been provided, nor does the witness list refer to another matter containing the synopsis. The government has not requested relief from the order directing a synopsis by 31 January, and in the 8-5 session conducted on 13 February, LTC Couch of the Chief Prosecutor's Office indicated that the failure to comply was not only intentional, but that the prosecution did not intend to comply in the future. To paraphrase LTC Couch: "The synopsis we provided the defense tells them that the witness will testify consistent with their statements, and we aren't going to tell them exactly what the witness is going to say. We're not going to give the defense our case on a silver platter, what we gave them is good enough and that's all they're going to get." This assertion by the prosecution is more accurate than an assertion that they have satisfied the Discovery Order's requirements, which is facially absurd. Even after the modification to the Discovery Order, the prosecution has failed to comply:

If any matter that has been disclosed to an opposing party contains a complete synopsis of a witness' testimony, the document is identified by Bates stamp number or otherwise, and the location of the document is reasonably described, no additional synopsis is required to be disclosed, provided that the witness list refers to the matter as containing the synopsis. PO G, para. 4.c.2.

Regarding contact information, the prosecution has failed to comply with the order. In one instance, the name of the witness is not provided (witness #46)(presumably due to classification issues), and on witnesses ## 1, 3, 5, 8, 10, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 41, 42, 43, 44, 45, and 46, no contact information for the witness is provided. In most instances, a contact number is given for a different individual who will presumably arrange actual contact. This was neither contemplated by the Discovery Order, nor did the prosecution seek relief from its requirements. With respect to some witnesses, the prosecution has no contact information (those for whom they seek to require the DDC to coordinate with the prosecution for contact), compounding the failure to provide an adequate synopsis by making it impossible for the DDC to contact the witness. The prosecution has stated that

for some of the witnesses for whom no contact information is given it is due to the fact that they have no contact information. This is not a legal basis for failure to comply with the Discovery Order, and the prosecution should be forbidden from either calling the witnesses or introducing their statements. In other instances, the prosecution has interposed itself between the DDC and CITF agents, for example witnesses 33, 37, and 44, with neither reason given nor permission sought from the PO.

12. c. DDC can neither concur nor non-concur.

12. d. DDC non-concurs. The prosecution has chosen to define "exculpatory" in a fashion unknown in the law and interprets the use of "exculpatory" to exclude impeachment evidence, striking in view of the broader standard for admissibility, i.e. "probative to a reasonable person" under the PMO and the MCO. The prosecution has exculpatory evidence it is declining to provide that has been expressly provided in other cases, e.g., statements of Binyam Mohammed regarding the use of torture to obtain evidence from him relating to the Accused, in addition to impeachment evidence in the form of prior inconsistent statements.

12. e. 1. DDC can neither concur nor non-concur.

12. e. 2. DDC can neither concur nor non-concur.

12. e. 3. DDC non-concurs. The prosecution is deliberately excluding from the definition of law enforcement agents operatives of both the CIA and DIA. Those agencies also participated in interrogations and serve a law enforcement function and statements they gathered must be disclosed.

12. e. 4. DDC can neither concur nor non-concur.

3. Regarding paragraph 13, DDC notes that the Discovery Order was issued on 21 December 2005, yet the prosecution waited until 24 January 2006 (one week before the discovery deadline) to request from INSCOM declassification of documents in the prosecution's possession for months. The prosecution waited until 20 January to seek declassification from SOUTHCOM and CENTCOM. It is important to note that each of these three organizations is a military organization. It is these documents the prosecution sought additional time to disclose.

4. Regarding paragraph 14, the DDC states as follows:

14. a. DDC concurs.

14. b. DDC concurs, and notes this leaves unresolved the request of DDC to view documents served in other cases and share served documents in its case with other DDC.

14. c. DDC concurs that the prosecution has offered no additional action since 10 February 2006. DDC notes that the prosecution proposal in no way addresses the concerns raised by DDC, and DDC reiterates its request the Protective Orders be amended as previously suggested by the DDC.

14. d. DDC does not concur. The prosecution states,

[T]he prosecution attempted to deliver to LTC Broyles on 13 February a list of all the agents, both FBI and CITF, which can be found on the CITF Form 40s released to him in discovery. This list was refused by LTC Broyles because LTC Broyles took the position that he *wanted* unredacted copies of the documents instead. Prosecution Status, para. 14.d. (Emphasis added)

This is inaccurate. The prosecution attempt to re-define its obligation is unacceptable to the DDC, and non-compliant disclosure will not be accepted as a substitute for the prosecution's obligation. The DDC has the right to, "Evidence **and** copies of all information the prosecution intends to offer at trial." The prosecution initially offered to at least allow the DDC to review the unredacted statements which would at a minimum allow for direct comparison with any matrix the prosecution thinks might be helpful *in addition to* rather than as a substitute for required disclosure, but it has never allowed such a review and has now withdrawn the offer. The prosecution has not sought relief from its obligation to provide copies, nor has it provided copies. Further, the prosecution alleges not that it has a legal basis for non-compliance, but rather that it has failed to obtain permission from subordinate agencies in the four years it has been preparing these cases.

14. e. DDC concurs, but no such database has yet been served on DDC.

14. f. The information technology manager for the Appointing Authority attempted to assist in making the disclosure searchable. The prosecution subsequently provided a partially searchable version of the documents. To clarify, "partially searchable" means that a search can be conducted, the program will report results, but they will not be accurate in that known instances of the searched for word will be missed. This renders the search function entirely unreliable.

14. g. DDC concurs, however, DDC has objected to the process of providing a point of contact as opposed to contact information, and again requests direct contact information for the witnesses, as required by the Discovery Order.

5. The decision of the prosecution to neither comply with the Discovery Order nor seek relief has prevented the DDC from making any headway in its own discovery actions. Most witnesses are not readily available due to the failure to provide meaningful contact information and the failure to provide a synopsis makes independent investigation impossible. The refusal of the prosecution to provide copies of its evidence prevents the DDC from determining what other individuals outside the prosecution's own witness list it may wish to contact or call. The decision of the prosecution to serve extraneous,

irrelevant matters on the DDC combined with the failure to organize the disclosure in any way (chronological, alphabetical, by witness, by interrogator) exacerbates the problem caused by serving unsearchable electronic documents on the DDC.

6. Paragraph 15 of the Discovery Order, issued on 21 December 2005 requires the DDC to serve its disclosure on the prosecution not later than 28 February, 28 days after the completion of the prosecution disclosure. In the interim, the prosecution has requested and received two extensions of its discovery deadline, and disclosure is now required by 1 April 2006.

a. Since being served the government's initial, partial disclosure, DDC has reviewed the documents served, and attempted to obtain complete, unredacted copies of the disclosure. The prosecution has declined to provide the required disclosure for which there is no extension and has declined to provide access to the documents. DDC has attempted to obtain complete contact information for the government's witnesses to no avail. DDC has arranged for travel to Saudi Arabia to speak to the accused's family, primarily to perfect the attorney-client relationship with the accused. Additionally, however, the trip will be used to conduct witness interviews and determine what members of the accused's family will be asked to testify. DDC has attempted to contact FBI agents listed as witnesses by the prosecution, but to date has had limited success. Coordination with John Dever, the point-of-contact for the FBI witnesses, was productive in that a new policy has been issued internally within the FBI that is expected to expedite access to FBI documents and witnesses. More explicit information will be provided to DDC on Friday or Monday.

b. On 7 March 2006, DDC was directed by the Presiding Officer to begin representational duties on behalf of the accused. Before that date, DDC was unable to act on behalf of the accused because of the lack of an attorney-client relationship. Moreover, to date, DDC does not know what, if any, defense the accused intends to raise. Pursuant to MCO No. 1, paragraph 5, "the accused **may** have defense counsel present evidence at trial in the accused's defense...." Until the accused provides guidance to DDC, a directed effort to obtain evidence and witnesses is impossible, though general preparatory activities have been and will continue to be undertaken.

7. Attached hereto is the witness list served on DDC on 1 February 2006, consisting of a six page Adobe .pdf document.

BRYAN T. BROYLES
LTC, JA
Detailed Defense Counsel

AL QAHTANI
REVIEW EXHIBIT 46
PAGES 233 TO 238

Review Exhibit (RE) 46, pages 233 to 238 is a Prosecution Witness List, dated Jan. 31, 2006. It lists the names of 45 witnesses, a “DoD Interrogator”, and a short synopsis of their probable testimony. Witnesses included on the list are assigned to the FBI, and the military services, as well as other detainees.

This record has been marked “Protected Information” and pertains to the identities of witnesses. As such, Protective Order No. 1, **RE 18** prohibits its release to the public.

RE 46, pages 233 to 238 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 46, pages 233 to 238**.

//signed//

M. Harvey
Chief Clerk of Military Commissions

Hodges, Keith

From: Hodges, Keith H CIV USSOUTHCOM JTFGTMO [REDACTED]
Sent: Friday, April 07, 2006 4:05 PM
To: Hodges, Keith
Subject: ACTION: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

Keith Hodges
 Assistant to the Presiding Officers
 [REDACTED]

-----Original Message-----

From: Hodges, Keith H CIV USSOUTHCOM JTFGTMO [REDACTED]
Sent: Wednesday, April 05, 2006 12:01 PM
To: [REDACTED]
Cc: [REDACTED]

JTF
Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

The Presiding Officer has directed that the parties be provided the following reply.

1. The defense objection was not responsive to the issue of granting the additional time requested by the prosecution; rather, it addressed the defense's preference on the manner in which the discovery should be delivered.
2. The prosecution will continue to deliver material required to be disclosed as soon as it becomes available.
3. The defense objection is DENIED.
4. The prosecution request to extend the deadline for discovery until 1 May 2006 is GRANTED.
5. The prosecution will notify the Presiding Officer and opposing counsel when discovery disclosures are complete.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
 Assistant to the Presiding Officers
 [REDACTED]

-----Original Message-----

RE 47 (al Qahtani)
 Page 1 of 3

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]

Sent: Monday, April 03, 2006 12:59 PM

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

Sir,

I oppose the extension of the deadline in this fashion. Rather than having a month to month series of requests for delay, I suggest that the Prosecution serve the matters when they are available, and notify the PO of that service, at which point the time for the defense disclosure would begin to run.

LTC Broyles

-----Original Message-----

From: Hodges, Keith [REDACTED]

Sent: Thursday, March 23, 2006 17:44

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

Does the defense object?

Keith Hodges
Assistant

From: [REDACTED]

Sent: Thursday, March 23, 2006 5:31 PM

To: [REDACTED]

Cc: [REDACTED]

Subject: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

Captain O'Toole,

In accordance with POM #4-3 the Prosecution makes a special request for relief for an additional extension of the Prosecution's discovery deadline ico U.S. v al Qahtani. In regard to discovery, the Prosecution has worked with due diligence since the inception of this case. However, there is certain evidence that falls under the discovery order that is still pending approval for release and/or declassification from various originating agencies. Furthermore, a recent change to FBI policy requires an additional internal (to FBI) process that has delayed an anticipated release of most of the FBI documents. The Prosecution respectfully moves that the Presiding Officer grant an extension of the Prosecution's deadline for discovery to 1 May 2006 so that the Prosecution may obtain final release authority for the remaining evidence.

Very Respectfully,

RE 47 (al Qahtani)
Page 2 of 3

[REDACTED]

Lead prosecutor
United States v al Qahtani

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Monday, April 10, 2006 2:36 PM

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Defense's discovery deadline ico US v al Qahtani

The Presiding Officer has granted an extension to the defense discovery deadline until 1 June 2006.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
 Assistant to the Presiding Officers
 Military Commission

From: [REDACTED]
Sent: Thursday, April 06, 2006 6:34 PM
To: [REDACTED]

Cc: Mr, [REDACTED]

Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Defense's discovery deadline ico US v al Qahtani

Sir,

The prosecution asked for a one month extension. The prosecution would not object to a defense extension of one month on its current deadline.

v/r
 LT [REDACTED]

-----Original Message-----

From: Hodges, Keith H CIV USSOUTHCOM JTFGTMO
Sent: Thursday, April 06, 2006 1:02 PM

To: [REDACTED]

Cc: [REDACTED]

RE 48 (al Qahtani)
 Page 1 of 5

4/10/2006

242

Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Defense's discovery deadline ico US v al Qahtani

Capt [REDACTED] I need a date, such as: we do not oppose a delay until _____ or _____ days after XYZ event.

Keith Hodges
Assistant to the Presiding Officers

-----Original Message-----

From: [REDACTED]
Sent: Thursday, April 06, 2006 12:55 PM
To: [REDACTED]

Cc: [REDACTED]

Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Defense's discovery deadline ico US v al Qahtani

Sir,

The Prosecution does not object to a delay commensurate with the delay granted the Prosecution. A 90-day delay at this point in the process would seem excessive. The Prosecution will continue to be reasonable in terms of delays requested by the defense counsel when requested in the future.

Capt [REDACTED]

-----Original Message-----

From: Hodges, Keith H CIV USSOUTHCOM JTFGTMO
Sent: Thursday, April 06, 2006 12:06 PM
To: [REDACTED]
Cc: [REDACTED]

Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Defense's discovery deadline ico US v al Qahtani

Does the Prosecution object?

Keith Hodges

RE 48 (al Qahtani)
Page 2 of 5

Assistant to the Presiding Officers

[REDACTED]

-----Original Message-----

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]

Sent: Wednesday, April 05, 2006 2:54 PM

To: [REDACTED]

Cc: [REDACTED]

Subject: Special Request for Relief IAW POM#4-3 for extension of Defense's discovery deadline ico US v al Qahtani

1. Detailed defense counsel requests a delay of 90 days from it's 1 May 2006 discovery obligation.
2. The Prosecution has requested and received, over defense objection, a third delay in providing its discovery. Defense has yet to receive the matrix pertaining to overlapping discovery in the ten charged cases, nor has defense yet received a qualifying synopsis of testimony of government witnesses. Additionally, the government has not disclosed unredacted statements, as required.

LTC Broyles

-----Original Message-----

From: Hodges, Keith H CIV USSOUTHCOM JTFGTMO

Sent: Wednesday, April 05, 2006 12:01

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

The Presiding Officer has directed that the parties be provided the following reply.

1. The defense objection was not responsive to the issue of granting the additional time requested by the prosecution; rather, it addressed the defense's preference on the manner in which the discovery should be delivered.
2. The prosecution will continue to deliver material required to be disclosed as soon as it becomes available.
3. The defense objection is DENIED.
4. The prosecution request to extend the deadline for discovery until 1 May 2006 is GRANTED.
5. The prosecution will notify the Presiding Officer and opposing counsel when discovery disclosures are complete.

BY DIRECTION OF THE PRESIDING OFFICER

RE 48 (al Qahtani)
Page 3 of 5

Keith Hodges
Assistant to the Presiding Officers

-----Original Message-----

From: Broyles, Bryan, LTC, DoD OGC
Sent: Monday, April 03, 2006 12:59 PM
To:
Cc:

Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

Sir,

I oppose the extension of the deadline in this fashion. Rather than having a month to month series of requests for delay, I suggest that the Prosecution serve the matters when they are available, and notify the PO of that service, at which point the time for the defense disclosure would begin to run.

LTC Broyles

-----Original Message-----

From: Hodges, Keith
Sent: Thursday, March 23, 2006 17:44
To:
Cc:

Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

Does the defense object?

Keith Hodges
Assistant

From:
Sent: Thursday, March 23, 2006 5:31 PM
To:
Cc:

Subject: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

Captain O'Toole,

In accordance with POM #4-3 the Prosecution makes a special request for relief for an additional extension of the Prosecution's discovery deadline ico U.S. v al Qahtani. In regard to discovery, the Prosecution has worked with due

RE 48 (al Qahtani)
Page 4 of 5

diligence since the inception of this case. However, there is certain evidence that falls under the discovery order that is still pending approval for release and/or declassification from various originating agencies. Furthermore, a recent change to FBI policy requires an additional internal (to FBI) process that has delayed an anticipated release of most of the FBI documents. The Prosecution respectfully moves that the Presiding Officer grant an extension of the Prosecution's deadline for discovery to 1 May 2006 so that the Prosecution may obtain final release authority for the remaining evidence.

Very Respectfully,


Lead prosecutor
United States v al Qahtani

Hodges, Keith

From: Hodges, Keith [REDACTED]

Sent: Tuesday, April 11, 2006 12:04 PM

To: [REDACTED]

Subject: Trial Order - al Qahtani - Trial Term of 24 April 2006

This is to confirm the business the Presiding Officer expects to conduct during a session of the Commission during the term of 24 April:

1. Conduct an initial session, including the below items.
2. Counsel shall be prepared to conduct voir dire and issue challenges of the Presiding Officer. The Presiding Officer will schedule specific case sessions during the term that best meet the ends of justice taking into account the needs of the parties, the Commission, and a full and fair trial.
3. Entry of pleas (if the defense requests to reserve entry of pleas and/or to reserve on motions, the Presiding Officer advises he will grant that request.)

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

[REDACTED]

Hodges, Keith

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]**Sent:** Monday, April 10, 2006 5:14 PM**To:** [REDACTED]**Subject:** RE: Draft of Trial Order - al Qahtani - 24 Apr trial term

1. Regarding challenges, I would ask that challenges be deferred until the end of the trial term, as that will allow counsel to review the voir dire conducted in the related cases, rather than having to either duplicate voir dire, or make an additional challenge raised by later voir dire.
2. I believe that a separate motion pursuant to 5 below may not be sufficient for some legal issues that may arise. The accused may have particular knowledge that will impact the discovery motion, or may have direction to give that will impact the motion. Under those circumstances, DDC should be allowed to withdraw any filed motion with leave to refile without prejudice. If that is the meaning of "...and may condition any Discover Order motion as needed to accurately reflect preservation of any issue regarding representation for litigation separately from objections to the Discovery Order," then, DDC has no objection to this procedure.
3. I don't anticipate a problem entering pleas, and will likely request to defer any other motions.
4. The date for raising objections to the hearing schedule is unworkable from a practical standpoint. I will meet with the accused on 20 April (JTF willing), and that is the only likely source of an objection to the hearing. I don't anticipate any such issue arising, but if it does, it will be on 20 April, and I could notify the parties by COB that day, or early on 21 April.

LTC Broyles

-----Original Message-----

From: Hodges, Keith [REDACTED]**Sent:** Monday, April 10, 2006 16:48**To:** [REDACTED]**Subject:** Draft of Trial Order - al Qahtani - 24 Apr trial term

Prosecution and Defense. The PO is considering whether to issue an email substantially as below. The intent is to ensure that: (1) The parties are prepared to conduct voir dire should the circumstances permit or require it, and that the defense can get a discovery motion into the motion practice pipeline so that such a motion can be litigated should the circumstances permit or require it.

What do you think ??

This is to confirm the business the Presiding Officer expects the parties to conduct during a session of the Commission during the week of 24 April:

1. Conduct an initial session.
2. Conduct voir dire and hear challenges, if any.

RE 49 (al Qahtani)
Page 2 of 3

3. Litigate any motion concerning the Discovery Order. In this regard, the Presiding Officer is aware that the Defense (in U.S. v. al Qahtani) has attempted to file such a motion in the past in various forms. The Presiding Officer agrees to the following procedures given the unique circumstances of this case:

a. The defense is to file any Discovery Order motion this week. The defense may preserve any issue regarding representation by filing a separate motion as noted in paragraph 5 below, and may condition any Discover Order motion as needed to accurately reflect preservation of any issue regarding representation for litigation separately from objections to the Discovery Order.

b. The prosecution responds to the motion using the POM 4-3 time frames.

c. The defense may reply using the POM 4-3 time frames.

4. Entry of pleas (if the defense requests to reserve entry of pleas and/or to reserve on motions, the Presiding Officer advises he will grant that request.)

5. If counsel have any reason that they will be unable to proceed with the initial session, including the items listed above, the reason therefore must be the subject of a motion for a continuance, or other relief, to be filed not later than 18 April.

6. Parties will reply to this email soonest, but not later than COB 11 April. In responding, parties will indicate whether there is any issue, not included above, that they wish to address during the 24 April session, including any issue regarding representation.

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Wednesday, April 12, 2006 11:36 AM
To: [REDACTED]

Subject: Update and Reply

The Presiding Officer requested that the following be provided to you:

1. Thank you, LTC Broyles, for the update.
2. All counsel seem to want to go last, and the Presiding Officer will have to look at each situation and make a decision. That time has not yet arrived. You are encouraged to maximize the time before the rest of the Commissions personnel arrive at GTMO to spent time with Mr. al Qahtani. The Presiding Officer makes no promises to any counsel in any case the order in which he will proceed until he has considered the input of all the parties.
3. An 8-5 is a good idea and the Presiding Officer will be available after he arrives and thereafter. Rather than set a time now, the Presiding Officer suggests you remain flexible so that you do not inadvertently set an 8-5 time when you need to be with the client.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]
Sent: Monday, April 10, 2006 15:43
To: O'Toole, Daniel E CAPT OJAG
Cc: [REDACTED]

Subject: Update on Saudi Travel

Sir,

1. Regarding the status of my trip to Saudi, it was complete and successful, at least so far. I have not yet presented the results of my trip to Mr. Al Qahtani in an attempt to establish an attorney/client relationship. I am currently scheduled to fly to Guantanamo on 19 April, and plan on seeing Mr. Al Qahtani on 20 April.
2. I am making arrangements with the JTF folks to have a television and DVD player available, or for them to allow me to take my laptop to my meeting, so that Mr. Al Qahtani can view the materials I obtained in my visit with his family.

RE 50 (al Qahtani)
Page 1 of 2

4/13/2006

3. I will stay at Guantanamo thru the end of the trial term, so per the email from Mr. Hodges regarding the specifics of the term, I ask only that I not be the first hearing on Tuesday, giving me time, if my relationship with my client changes, to fully develop his intent and ascertain his litigation goals. This will allow me to more intelligently inform the court on the time necessary for motions, or if there will be motions.

4. I request we have an 8-5 session either late on Monday or early Tuesday so that I can clarify to both yourself and the prosecution, my relationship with Mr. Al Qahtani prior to any on the record sessions.

Bryan Broyles
LTC, JA


Hodges, Keith

From: Hodges, Keith H CIV USSOUTHCOM JTFGTMO [REDACTED]**Sent:** Wednesday, April 05, 2006 11:49 AM**To:** Broyles, Bryan, LTC, DoD OGC; [REDACTED]**Cc:** [REDACTED]**Subject:** RE: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

The Presiding Officer has requested that I communicate the following to the parties.

1. The most recent Trial Terms of the Military Commission publication indicated, "Counsel are responsible for being available to be present at ALL trial terms. Counsel must have absences from a trial term approved by the Presiding Officer." That has not changed.
2. If you desire to request to be absent from any particular trial term (whether your case has been already docketed or not,) you may request it from the Presiding Officer. Until such a request is made and approved, you "are responsible for being available to be present at ALL trial terms."

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers

[REDACTED]

-----Original Message-----

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]**Sent:** Monday, April 03, 2006 12:59 PM**To:** [REDACTED]**Cc:** [REDACTED]**Subject:** RE: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

Sir,

I oppose the extension of the deadline in this fashion. Rather than having a month to month series of requests for delay, I suggest that the Prosecution serve the matters when they are available, and notify the PO of that service, at which point the time for the defense disclosure would begin to run.

LTC Broyles

-----Original Message-----

RE 51 (al Qahtani)
Page 1 of 3

4/13/2006

From: Hodges, Keith [REDACTED]
Sent: Thursday, March 23, 2006 17:44
To: [REDACTED]
Cc: [REDACTED]

Subject: RE: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

Does the defense object?

Keith Hodges
 Assistant

From: [REDACTED]
Sent: Thursday, March 23, 2006 5:31 PM
To: [REDACTED]
Cc: [REDACTED]

Subject: Special Request for Relief IAW POM#4-3 for extension of Prosecution's discovery deadline ico US v al Qahtani

Captain O'Toole,

In accordance with POM #4-3 the Prosecution makes a special request for relief for an additional extension of the Prosecution's discovery deadline ico U.S. v al Qahtani. In regard to discovery, the Prosecution has worked with due diligence since the inception of this case. However, there is certain evidence that falls under the discovery order that is still pending approval for release and/or declassification from various originating agencies. Furthermore, a recent change to FBI policy requires an additional internal (to FBI) process that has delayed an anticipated release of most of the FBI documents. The Prosecution respectfully moves that the Presiding Officer grant an extension of the Prosecution's deadline for discovery to 1 May 2006 so that the Prosecution may obtain final release authority for the remaining evidence.

Very Respectfully,

[REDACTED]
 Lead prosecutor
 United States v al Qahtani

Hodges, Keith

From: Broyles, Bryan, LTC, DoD OGC [REDACTED]

Sent: Monday, April 03, 2006 8:23 AM

To: [REDACTED]

Cc: [REDACTED]

Subject: Availability for Trial Terms

Sir,

I will not be available for the 9 - 14 July trial term. I anticipate not being available for the 15 - 19 May term, due to travel to Pakistan. I will advise of future non-availability as soon as the dates are known. Between now and 1 Oct, I will be taking something on the order of 30 days leave, no single period anticipated to exceed one full work week.

Bryan Broyles
LTC, JA
[REDACTED]

AL QAHTANI
REVIEW EXHIBIT 52

Review Exhibit (RE) 52 is curriculum vitae of Translators “A” and “B.”

RE 52 consists of 7 pages.

Translators A and B have requested, and the Presiding Officer has determined that **RE 52** not be released on the Department of Defense Public Affairs web site. In this instance Translators A and B’s right to personal privacy outweighs the public interest in this information.

RE 52 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 52**.

//signed//

M. Harvey
Chief Clerk of Military Commissions

[REDACTED]

Military Commission Case No. 05-0007

UNITED STATES

v.

JABRAN SAID BIN AL QAHTANI

a/k/a Salam al Farsi

a/k/a Hateb

a/k/a Jabran al Qahtan

a/k/a Saad Wazar Hatib Jabran

a/k/a Jabran Saad Wazar Sulayman

a/k/a Jabran Wazar

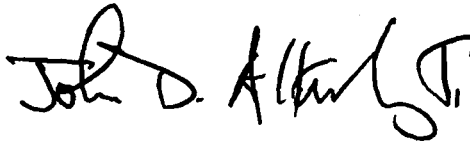
Military Commission Members

Appointing Order No. 06-0006

FEB 01 2006

Appointing Order No. 05-0008 dated December 16, 2005, appointing military commission members in the above-styled case, is amended as follows:

Lieutenant Colonel [REDACTED] USMC, Second Alternate Member, is excused from participation in the case of United States v. Jabran Said Al Qahtani, pursuant to Paragraph (4)(A)(3) of Military Commission Order No. 1 dated August 31, 2005, due to his impending terminal leave and retirement effective May 1, 2006.



John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

[REDACTED]

**DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640**

APPOINTING ORDER No. 06-0010

March 27, 2006

Appointing Order Numbers 05-0004, 05-0005, 05-0006, 05-0007, 05-0008, and 06-0001, appointing military commission members, are amended as follows:

Colonel [REDACTED] USAF, Member, is excused from participation in all military commission cases, pursuant to Paragraph (4)(A)(3) of Military Commission Order No. 1 dated August 31, 2005, due to his impending retirement.



John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

cc:

Presiding Officer

Chief Prosecutor for Military Commissions

Chief Defense Counsel for Military Commissions

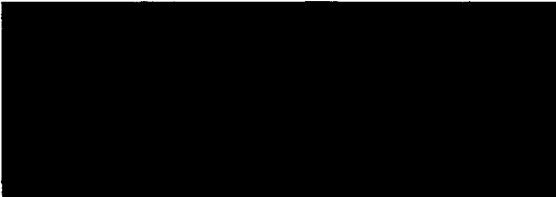
Detailed Military Defense Counsel



OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

APPOINTING AUTHORITY

February 14, 2006



Dear Commander [REDACTED]

I have reviewed your request to be excused as a panel member for the Military Commissions. While I understand your concern regarding a possible career opportunity, your request is denied.

Serving as a member of the Military Commissions is an important duty. You were nominated by your service and selected to serve. Military Commission members are chosen based on their age, education, training, experience, length of service, and judicial temperament. They are absolutely critical to the process of affording all defendants a full and fair trial.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Index of Current POMs – April 23, 2006

See also: http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

Number	Topic	Date
1 - 2	Presiding Officers Memoranda	September 14, 2005
2 - 2	Appointment and Role of the Assistant to the Presiding Officers	September 14, 2005
3 - 1	Communications, Contact, and Problem Solving	September 8, 2005
4 - 3	Motions Practice	September 20, 2005
5 - 1 *	Spectators at Military Commissions	September 19, 2005
6 - 2	Requesting Conclusive Notice to be Taken	September 9, 2005
7 - 1	Access to Evidence, Discovery, and Notice Provisions	September 8, 2005
8 - 1	Trial Exhibits	September 21, 2005
9 - 1	Obtaining Protective Orders and Requests for Limited Disclosure	September 14, 2005
10 - 2	Presiding Officer Determinations on Defense Witness Requests	September 30, 2005
11	Qualifications of Translators / Interpreters and Detecting Possible Errors or Incorrect Translation / Interpretation During Commission Trials	September 7, 2005
12 - 1	Filings Inventory	September 29, 2005
13 - 1 *	Records of Trial and Session Transcripts	September 26, 2005
14 - 1 *	Commissions Library	September 8, 2005
(15)	There is currently no POM 15	
16	Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties, and Witnesses	February 16, 2006
(17)	There is currently no POM 17	
18	8-5 Conferences	March 21, 2006

* - Also a joint document issued with the Chief Clerk for Military Commissions.

Hodges, Keith H CIV USSOUTHCOM JTFGTMO

From: [REDACTED]
Sent: Monday, April 24, 2006 10:19 AM
To: Hodges, Keith H CIV USSOUTHCOM JTFGTMO
Subject: RE: Identity of Defense Translators

In the case of US v. Al Qahtani, the Defense Translator's name is [REDACTED]

-----Original Message-----

From: Hodges, Keith H CIV USSOUTHCOM JTFGTMO
Sent: Monday, April 24, 2006 10:15 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: Identity of Defense Translators

The POs support the desire of Defense Translators who do not wish to have their names mentioned on the record. However, it is still necessary that the record reflect who they were in the form of an RE which, before release, can be redacted..

Defense, please reply to this email with the name of the defense translator. That document will be marked as an RE.

Keith Hodges
Assistant to the Presiding Officers
[REDACTED]

RE 55 (al Qahtani)
Page 1 of 1

U.S. v. al Qahtani
Summary of 8-5 Conference prepared by CAPT O'Toole, Presiding Officer
24 April 2006

Counsel present: LtCol Broyles, Detailed Defense Counsel; LT [REDACTED] and CPT [REDACTED]
Prosecution Counsel

1. This session was held to discuss the order of proceedings at the initial session in this case, scheduled for tomorrow.
2. The PO first inquired into some preliminary matters, including the use of counsel names, the need for a defense translator, and whether there was any issue with respect to obtaining suitable clothing for the accused. All counsel indicated that the PO may use their rank, title or name, as necessary. Defense indicated that there was a defense translator available and, although DDC had not yet seen the clothing, that the accused had appropriate attire for tomorrow's session.
3. The PO indicated that following determination on the record of whether the accused needs a translator, the PO will cover identification of counsel, advisement of the accused's rights to counsel, and his election of counsel.
4. The PO indicated that following the accused's election of counsel, the next matter at issue would be the status of Protective Orders. In this regard, counsel indicated that they have concurred in modifications submitted to the PO by Prosecution email 19 April 2006. However, while the DDC had no objection to the suggested modifications, and he believed that the suggested modifications represented an improvement to the status quo, he reserved objections to other aspects of the protective orders, even as modified. The Prosecution indicated that the only information that must be redacted from documents disclosed to defense were those redactions required by ProtOrds 1 and 2, that is, the names of participating agents and witnesses. The Prosecution further advised the PO that the originating agencies of the United States have given consent for the release to the accused of all documents thus far provided to the defense, provided that these documents are redacted in accordance with ProtOrds 1 and 2. This information, however, must be protected from dissemination beyond the accused and his defense team. Both sides concurred that the ProtOrds, as suggested to be modified, adequately protects the information contained in the documents provided to the defense. The PO indicated that, based on the representations of counsel, he would accept the Prosecution suggested modifications and publish a draft to all counsel for final concurrence. The modified version of ProtOrds 1, 2, and 3 would be announced as those ProtOrds in effect at the initial session.
5. The PO indicated that, should the defense have objections to the ProtOrds, those objections are to be made the subject of a motion for relief. The PO also directed the Prosecution to file a motion in accordance with governing POMs, in the event there is a change in the nature or status of any document thus far released to the defense, or in the

event of an additional disclosure of documents not adequately addressed by the ProtOrds, as modified.

6. The PO indicated that, following discussion of the ProtOrds on the record, he would ask for defense motions and entry of pleas. Neither the Prosecution nor the DDC indicated that they had any motions for consideration at the initial session.

7. DDC indicated that he might raise a request for relief to view the living quarters of his client. The PO requested that his matter first be referred to the JTF SJA and to the Prosecution for informal resolution, if possible, and that if resolution was not possible, any relief be made the subject of a motion.

8. DDC also indicated that he intended to request any challenge of the PO be permitted to be submitted in writing within a week of the close of this session rather than verbally on the record at tomorrow's session. The PO indicated that he would take this under advisement.

9. Neither side had any additional matters for the PO prior to tomorrow's session. The PO requested that, if there was any change in the status of matters discussed, that counsel provide the courtesy to the PO, and to each other, of advising of such a change.

Filings Inventory –
US v. al Qahtani

PUBLISHED:

Issued in accordance with POM #12-1.
See POM 12-1 as to counsel responsibilities.

This Filings Inventory includes only those matters filed since 4 Nov 2005.

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes OR = First filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	RE
None				•	

Defense (D Designations) **Dates in red indicate due dates**

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
None				•	
				•	
				•	
				•	
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				•	
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PO Designations

Designation Name (PO)	Status /Disposition/Notes ORIG = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE
PO 1 – Scheduling	<ul style="list-style-type: none"> • Initial directions of PO w/ three attachments, Dec 21 05 • A. DC request for 8-5 conference, 3 Jan 06 • B. Memo of Phone conference, 4 Jan 06 • C. Pros and DC ready on 13 Feb • D. PO confirmation of APO comments to counsel (See PO 1 B) 20 Jan 06 • E. Announcement of Feb trial term, 19 Jan 06 • F. PO 1 F - al Qahtani - Trial order for Feb Term (23 Jan 06) • G.POs response to DDC's comments RE PO 1 F, 25 Jan 06 • H. DDC comment about Protective Orders and PO response, 25 Jan 06. • I. DDC status update and PO response, 26 Jan 06 • J. DDC request for delay, questions to DDC, DDC response, and PO decision. • PO 1 K: Prosecution proposed trial calendar. • PO 1 L: Defense update, 17 Feb • NOTE: 8-5 held on 2 Mar. PO sent summary. See RE 40. • NOTE: PO 1 J status report received. PO directed supplement to same by 8 March. Supplement received. See RE 43. • NOTE 15 Mar status report received. See RE 45. • PO 1 M: Trial Order for Apr 24 Term. 	ORIG – 7 A – 10 B – 11 C – 13 D – 14 E – 16 F – 17 G – 22 H – 23 I – 24 J – 25 K – 33 L – 34 M – 49
	<ul style="list-style-type: none"> • 	
	<ul style="list-style-type: none"> • 	

Designation Name (PO)	Status /Disposition/Notes ORIG = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE
PO 2 - Discovery	<ul style="list-style-type: none"> • Discovery Order, Dec 21 05 • INFO: Pros request to delay to delay some discovery until 1 Mar granted without defense objection. • A: Defense special request for relief and PO denial to handle as such a request. • B. Defense special request for relief and PO denial to handle as such a request. • C. Defense special request for relief and PO denial to handle as such a request. • D. Defense special request for relief and PO denial to handle as such a request. • E. Memo of PO 8-5 conference and various emails leading up to same. • F. Discovery status order, 2 March 06. • NOTE Prosecution discovery deadline approved to 1 Apr. Defense discovery deadline approved to 1 May. • G. Modification to Discovery Order (3 Mar 06). • NOTE: 8-5 held on 2 Mar. PO sent summary. See RE 40. • NOTE: Prosecution responded to PO 2 F, Discovery Status Order. See RE 44. • NOTE: Defense responded to Discovery Status Order PO 2 F. See RE 46. • NOTE: Prosecution request to extend discovery deadline to 1 May granted. See RE 47. • NOTE: Defense discovery deadline extended until 1 June. See RE 48. 	ORIG – 8 A – 26 B – 27 C – 28 D – 29 E – 35 F – 38 G - 39

Designation Name (PO)	Status /Disposition/Notes ORIG = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE
PO 3 Voir dire	<ul style="list-style-type: none"> • PO's biographical summary. • Note: PO sent supplement to Voir Dire materials, 22 Feb 06. This was made RE 36. 	ORIG – 15
PO 4 – Motions	<ul style="list-style-type: none"> • 25 Jan APO email RE Preserving Objections and POM 4-3 and 12-1 	ORIG – 21
PO 5 – ProSe	<ul style="list-style-type: none"> • PO 5: POs Order RE DDC representation • Corrected copy of PO 5 issued. 	ORIG – 41 Corrected copy – 42

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	RE
	Protective Order # 1	1	23 Jan 06	ID of all witnesses	18
	Protective Order # 2	2	23 Jan 06	ID of investigators	19
	Protective Order # 3	3	23 Jan 06	FOUO and other markings	20
See also PO 2 D					
				•	

Inactive Section

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference Notes	RE
P 1 - Motion to join cases (6 Feb 06)	6 Feb 06			<ul style="list-style-type: none"> • Motion filed 6 Feb 06 • A. DDC comment on replying to P-1 and PO reply. (APO Note – the entire thread of emails was not included for reasons of efficiency as they are part of other filings.) • Note: P 1 withdrawn without defense objection. See RE 37. 	OR – 30 A - 32

Defense (D Designations)

RE 57 (al Qahtani)
Page 8 of 9

Inactive Section

PO Designations

Designation Name (PO)	Status /Disposition/Notes OR = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE

UNITED STATES OF AMERICA
v.
JABRAN SAID BIN AL QAHTANI
a/k/a Salam al Farsi
a/k/a Hateb
a/k/a Jabran al Qahtan
a/k/a Saad Wazar Hatib Jabran
a/k/a Jabran Saad Wazar Sulayman
a/k/a Jabran Wazar

Protective Order # 3-A
Protection of "For Official Use Only" or "Law
Enforcement Sensitive" Marked Information and
Information with Classified Markings

24 April 2006

This Protective Order supercedes Protective Order #3 in the above-styled case, and has been issued pursuant to Commission Law, at the request of the Prosecution and with the consent of the Defense, to ensure the protection of information, and so that the parties may advance the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. Generally: The following Order is issued to provide general guidance and specific prohibitions regarding the below described documents and information. Unless otherwise noted, required, or requested, it does not govern the use of such documents or information in open court.

2. Scope: This Order pertains to information, in any form, provided or disclosed to the defense team in their capacity as legal representatives of the accused before a military commission. Protection of information in regards to litigation separate from this military commission would be governed by whatever protective orders are issued by the judicial officer having cognizance over that litigation.

3. Definition of Prosecution and Defense: For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, counsel, paralegals, investigators, translators, administrative staff, and experts and consultants assisting the Defense in Military Commission proceedings against the accused. The term "Prosecution" includes all counsel, co-counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who participate in the prosecution, investigation, or interrogation of the accused.

4. Effective Dates and Classified Information: This Protective Order shall remain in effect until rescinded or modified by the Presiding Officer or other competent authority. This Order shall not be interpreted to suggest that information classified under the laws or regulations of the United States may be disclosed in a manner or to those persons inconsistent with those statutes or regulations.

5. UNCLASSIFIED SENSITIVE MATERIALS:

a. IT IS HEREBY ORDERED that documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense

("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as marked unless and until proper authority removes such marking. If either party wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Presiding Officer. Nothing in this Protective Order limits a member of the Defense team from divulging, publishing, or revealing, either by work, conduct, or any other means, to members of other Defense teams, documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive," provided that the other defense team member to whom divulging, publishing, or revealing is to be made is already in possession of the same documents or information through discovery in a case pending before a Military Commission to which that other defense team member is detailed, and said information is subject to an identical protective order as has been issued in this case.

b. IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

c. Nothing in this Protective Order limits the Defense team from divulging, publishing, or revealing, either by word, conduct, or any other means, to the accused, documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive," provided such documents have been disclosed to the Defense team by the Prosecution, and provided further that those documents have been redacted to comply with Protective Orders 1 and 2, or later versions of such order or orders.

6. CLASSIFIED MATERIALS:

a. IT IS FURTHER ORDERED that all parties shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.

b. IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of this case's review and final decision by the President or, if designated, the Secretary of Defense, and any post-trial U.S. federal litigation that may occur.

7. BOOKS, ARTICLES, OR SPEECHES:

a. FINALLY, IT IS ORDERED that neither members of the Defense team nor the Prosecution shall divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Defense team or the Prosecution shall submit any book, article, speech, or other publication derived from, or based upon information gained in the course of representation of the accused in military commission proceedings to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against the accused.

b. The provisions in paragraph 7a apply to information learned in the course of representing the accused before this commission, no matter how that information was obtained. For example, paragraph 7a:

(1) Does not cover press conferences given immediately after a commission hearing answering questions regarding that hearing so long as it only addresses the aspects of the hearing that were open to the public.

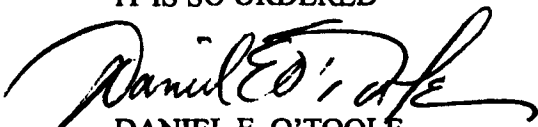
(2) Does not cover public discourses of information or experiences in representing the accused before this military commission which is already known and available in the public forum, such as open commission hearings, and motions filed and made available to the public.

(3) Does cover information or knowledge obtained through any means, including experience, that is not in the public forum, and would and could only be known through such an intimate interaction in the commission process (for example, a defense counsel's experience logistically in meeting a client).

8. REQUEST FOR EXCEPTIONS: Either party may file a motion, under seal and in accordance with POM 4-3 or 9-1 as appropriate, for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial and/or, if necessary, any appeal.

9. BREACH: Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED



DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer



DEPARTMENT OF THE NAVY
GENERAL COUNSEL OF THE NAVY
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

JUL - 7 2004

SECRET - Unclassified upon removal of attachments

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF THE NAVY

Subj: STATEMENT FOR THE RECORD: OFFICE OF GENERAL COUNSEL
INVOLVEMENT IN INTERROGATION ISSUES

Ref: (a) NAVIG Memo 5021 Ser 00/017 of 18 Jun 04

This responds to your request at reference (a) for a statement that chronicles any involvement by the Department of the Navy Office of the General Counsel (OGC) or me personally in the development of the "interrogation rules of engagement" (IROE) for Operation Enduring Freedom and Operation Iraqi Freedom. The following narrative adopts a slightly broader focus. It seeks to describe any such knowledge or involvement as OGC or I had on any aspect of the interrogation techniques used or contemplated following September 11, 2001, including participation in legal analysis or discussions of such issues. In the end, it is largely an account of my personal actions or knowledge. Unless otherwise indicated, the use below of the term "OGC" includes my personal knowledge or activity as well as that of other OGC attorneys or personnel.

Before discussing the specifics of this involvement, four key factors or events warrant mention by way of background:

First, as a general rule, OGC has not had any official responsibility for or involvement in detainee interrogation practices, procedures, or doctrines, including IROE. Because the Department of the Navy (DON) does not have and has not had assigned responsibilities for detainee interrogation matters, OGC was neither consulted nor informed of such issues. Apart from the incidental events recounted here, the one exception to this occurred on January 17, 2003, when the General Counsel of the Air Force, acting pursuant to SECDEF and DOD GC direction, requested that OGC participate in an inter-Service Detainee Interrogation Working Group. When the Working Group ceased its work in late March 2003, OGC official involvement in detainee interrogation issues also stopped.

Second, my duties as General Counsel of the Navy include serving as the Reporting Senior within the DON Secretariat for

the Naval Criminal Investigative Service (NCIS). These duties extend beyond the function of providing legal counsel and include general oversight responsibility over NCIS operations, policies, and budget. As a component under the operational control of other commands, NCIS has had some worldwide involvement on issues of detainee custody, treatment, and criminal interrogations and, specifically, those involving the Guantanamo detainees. As a result, I gained a measure of insight into detainee treatment and interrogation practices commensurate with NCIS's scope and degree of involvement.

Third, in December 2002, I received a report of detainee abuse occurring at Guantanamo Naval Base, Cuba, and complaints about interrogation guidelines pertaining to those detainees. Because the Guantanamo detainee interrogations, as noted above, were not the responsibility of the DON, I had no official oversight responsibilities in the matter. These alleged abuses were not being inflicted by Navy or Marine Corps personnel or pursuant to DON authorities or actions. OGC attorneys were not involved. Nonetheless, I chose to inquire further into the allegations. This narrative largely involves my response to the allegations that interrogation abuses were occurring at Guantanamo.

Fourth, in the following narrative a number of meetings and conversations are recounted, but this account is by necessity somewhat incomplete. While I have attempted to identify all individuals who participated, this was not always possible. Also, the narrative does not attempt to document the numerous meetings or conversations on the issues that I held with DON staff and colleagues as the events unfolded, in particular with my two Deputy General Counsel, Tom Kranz and William Molzahn; my Executive and Military Assistants, CAPT Charlotte Wise and LtCol Rick Schieke; the Judge Advocate General, RADM Michael Lehr; the Staff Judge Advocate to the Commandant, BGen Kevin Sandkuhler; the Counsel to the Commandant, Peter Murphy; and many senior OGC attorneys.

With this background, the following constitutes a chronological narrative of the significant events pertaining to detainee interrogations in which OGC or I participated or of which I had knowledge.

17 Dec 02

In a late afternoon meeting, NCIS Director David Brant informed me that NCIS agents attached to JTF-160, the criminal investigation task force in Guantanamo, Cuba, had learned that

some detainees confined in Guantanamo¹ were being subjected to physical abuse and degrading treatment. This treatment — which the NCIS agents had not participated in or witnessed — was allegedly being inflicted by personnel attached to JTF-170, the intelligence task force, and was rumored to have been authorized, at least in part, at a "high level" in Washington, although NCIS had not seen the text of this authority. The NCIS agents at Guantanamo and civilian and military personnel from other services were upset at this mistreatment and regarded such treatment as unlawful and in violation of American values. Director Brant emphasized that NCIS would not engage in abusive treatment even if ordered to and did not wish to be even indirectly associated with a facility that engaged in such practices.

Director Brant asked me if I wished to learn more. Disturbed, I responded that I felt I had to. We agreed to meet again the following day. That evening, I emailed RADM Michael Lohr, the Navy JAG, and invited him to attend the next morning's meeting with NCIS.

18 Dec 02

I met with Director Brant and NCIS Chief Psychologist Dr. Michael Gelles. Dr. Gelles had advised JTF-160 in interrogation techniques and had spent time at the detention facility. Also present were OGC Deputy General Counsel William Molzahn, RADM Michael Lohr, and my Executive Assistant, CAPT Charlotte Wise.

Dr. Gelles described conditions in Guantanamo and stated that guards and interrogators with JTF-170, who were under pressure to produce results, had begun using abusive techniques with some of the detainees. These techniques included physical contact, degrading treatment (including dressing detainees in female underwear, among other techniques), the use of "stress" positions, and coercive psychological procedures. The military interrogators believed that such techniques were not only useful, but were necessary to obtain the desired information. NCIS agents were not involved in the application of these techniques or witnesses to them, but had learned of them through discussions with

¹ Guantanamo Naval Base is operated by the Navy. However, tenant operations reporting through different chains of commands — such as JTF-160 and JTF-170 — or different agencies do not provide operational reports to the base commander. Thus, such information would not necessarily filter up to OGC or the DoN Secretariat.

personnel who had been involved and through access to computer databases where interrogation logs were kept. Dr. Gelles showed me extracts of detainee interrogation logs² evidencing some of this detainee mistreatment. (Att 1)

These techniques, Dr. Gelles explained, would violate the interrogation guidelines taught to military and law enforcement personnel and he believed they were generally violative of U.S. law if applied to U.S. persons. In addition, there was great danger, he said, that any force utilized to extract information would continue to escalate. If a person being forced to stand for hours decided to lie down, it probably would take force to get him to stand up again and stay standing. In contrast to the civilian law enforcement personnel present at Guantanamo, who were trained in interrogation techniques and limits and had years of professional experience in such practices, the military interrogators were typically young and had little or no training or experience in interrogations. Once the initial barrier against the use of improper force had been breached, a phenomenon known as "force drift" would almost certainly begin to come into play. This term describes the observed tendency among interrogators who rely on force. If some force is good, these people come to believe, then the application of more force must be better. Thus, the level of force applied against an uncooperative witness tends to escalate such that, if left unchecked, force levels, to include torture, could be reached. Dr. Gelles was concerned that this phenomenon might manifest itself at Guantanamo.

Director Brant reiterated his previous statements that he and the NCIS personnel at Guantanamo viewed any such abusive practices as repugnant. They would not engage in them even if ordered and NCIS would have to consider whether they could even remain co-located in Guantanamo if the practices were to continue. Moreover, this discontent was not limited to NCIS; law enforcement and military personnel from other services were also increasingly disturbed by the practice.

Director Brant also repeated that NCIS had been informed that the coercive interrogation techniques did not represent simply rogue activity limited to undisciplined interrogators or even practices sanctioned only by the local command, but had been reportedly authorized at a "high level" in

² My recollection is that I was shown extracts of these interrogation logs on this date. However, OGC documents indicate that these log extracts were emailed to me on January 13, 2003.

Washington. NCIS, however, had no further information on this.

The general mood in the room was dismay. I was of the opinion that the interrogation activities described would be unlawful and unworthy of the military services, an opinion that the others shared. I commended NCIS for their values and their decision to bring this to my attention. I also committed that I would try to find out more about the situation in Guantanamo, in particular whether any such interrogation techniques had received higher-level authorization.

19 Dec 02

Knowing that the Department of the Army had Executive Agent responsibility for Guantanamo detainee operations, I called Steven Morello, the Army General Counsel, and told him that I had heard of alleged interrogation abuses in Guantanamo. Mr. Morello responded that he had information on the issue and invited me to visit with him and his deputy, Tom Taylor, to discuss it further.

In the Army OGC offices, Mr. Morello and Mr. Taylor provided me with a copy of a composite document (Att 2) capped by an Action Memo from DOD General Counsel William Haynes to the Secretary of Defense entitled "Counter-Resistance Techniques." The memo, which I had not seen before,³ evidenced that on December 2, 2002, Secretary Rumsfeld had approved the use of certain identified interrogation techniques at Guantanamo, including (with some restrictions) the use of stress positions, hooding, isolation, "deprivation of light and auditory stimuli," and use of "detainee-individual phobias (such as fear of dogs) to induce stress." This composite document (further referred to as the "December 2nd Memo") showed that the request for the authority to employ the techniques had originated with an October 11, 2002, memorandum from MG Michael Dunlavey, the Commander of JTF-170, to the Commander, SOUTHCOM, and had proceeded up the chain of command through the Joint Staff until reaching the Secretary. The Dunlavey memo was accompanied by a legal brief signed by

³ Later, we would determine that this memo had been circulated by the Joint Staff to the OPNAV Staff, where it had been reviewed by a Navy captain who, on November 2, 2002, had concurred in the memo with caveats, including the need for a more detailed interagency legal and policy review. (Att 3) The memo was apparently not circulated further within the DON and had never reached my office or RADM Lehr's.

LTC Diane Beaver, the SJA to JTF-170, generally finding that application of the interrogation techniques complied with law.

Mr. Morello and Mr. Taylor demonstrated great concern with the decision to authorize the interrogation techniques. Mr. Morello said that "they had tried to stop it," without success, and had been advised not to question the settled decision further.

Upon returning to my office, I reviewed the Secretary's December 2nd Memo and the Beaver Legal Brief more closely. The brief held, in summary, that torture was prohibited but cruel, inhuman, or degrading treatment could be inflicted on the Guantanamo detainees with near impunity because, at least in that location, no law prohibited such action, no court would be vested with jurisdiction to entertain a complaint on such allegations, and various defenses (such as good motive or necessity) would shield any U.S. official accused of the unlawful behavior. I regarded the memo as a wholly inadequate analysis of the law and a poor treatment of this difficult and highly sensitive issue. As for the December 2nd Memo, I concluded that it was fatally grounded on these serious failures of legal analysis. As described in the memo and supporting documentation, the interrogation techniques approved by the Secretary should not have been authorized because some (but not all) of them, whether applied singly or in combination, could produce effects reaching the level of torture, a degree of mistreatment not otherwise proscribed by the memo because it did not articulate any bright-line standard for prohibited detainee treatment, a necessary element in any such document. Furthermore, even if the techniques as applied did not reach the level of torture, they almost certainly would constitute "cruel, inhuman, or degrading treatment," another class of unlawful treatment.

In my view, the alleged detainee abuse, coupled with the fact that the Secretary of Defense's memo had authorized at least aspects of it, could — and almost certainly would — have severe ramifications unless the policy was quickly reversed. Any such mistreatment would be unlawful and contrary to the President's directive to treat the detainees "humanely." In addition, the consequences of such practices were almost incalculably harmful to U.S. foreign, military, and legal policies. Because the American public would not tolerate such abuse, I felt the political fallout was likely to be severe.

I provided RADM Lohr with a copy of the December 2nd Memo and requested that Navy JAG prepare a legal analysis of the issues. I also decided to brief Secretary of the Navy Gordon England and take my objections to DOD GC Haynes as quickly as possible.

Later that day, RADM Lohr wrote via email that he had brought the allegations of abuse to the attention of the Vice Chief of Naval Operations, ADM William Fallon. (Att 4)

20 Dec 02

At 1015, in a very short meeting, I briefed Navy Secretary Gordon England on the NCIS report of detainee abuse, on the December 2nd Memo authorizing the interrogation techniques, and on my legal views and policy concerns. I told him I was planning to see DOD GC Haynes that afternoon to convey my concerns and objections. Secretary England authorized me to go forward, advising me to use my judgment.⁴

That afternoon I met with Mr. Haynes in his office. I informed him that NCIS had advised me that interrogation abuses were taking place in Guantanamo, that the NCIS agents considered any such abuses to be unlawful and contrary to American values, and that discontent over these practices were reportedly spreading among the personnel on the base. Producing the December 2nd Memo, I expressed surprise that the Secretary had been allowed to sign it. In my view, some of the authorized interrogation techniques could rise to the level of torture, although the intent surely had not been to do so. Mr. Haynes disagreed that the techniques authorized constituted torture. I urged him to think about the techniques more closely. What did "deprivation of light and auditory stimuli" mean? Could a detainee be locked in a completely dark cell? And for how long? A month? Longer? What precisely did the authority to exploit phobias permit? Could a detainee be held in a coffin? Could phobias be applied until madness set in? Not only could individual techniques applied singly constitute torture, I said, but also the application of combinations of them must surely be recognized as potentially capable of reaching the level of torture. Also, the memo's fundamental problem was that it was

⁴ At this time, Secretary England's nomination to serve as Deputy Secretary of the Department of Homeland Security had been announced, and he was transitioning out of the DON. He would ultimately transfer out of the Department on January 23, 2003. This would be my only conversation with him on the issue until months later, well after his return as Navy Secretary.

completely unbounded — it failed to establish a clear boundary for prohibited treatment. That boundary, I felt, had to be at that point where cruel and unusual punishment or treatment began. Turning to the Beaver Legal Brief, I characterized it as an incompetent product of legal analysis, and I urged him not to rely on it.

I also drew Mr. Haynes's attention to the Secretary's hand-written comment on the bottom of the memo, which suggested that detainees subjected to forced standing (which was limited to four hours) could be made to stand longer since he usually stood for longer periods during his work day.⁵ Although, having some sense of the Secretary's verbal style, I was confident the comment was intended to be jocular, defense attorneys for the detainees were sure to interpret it otherwise. Unless withdrawn rapidly, the memo was sure to be discovered and used at trial in the military commissions. The Secretary's signature on the memo ensured that he would be called as a witness. I told Mr. Haynes he could be sure that, at the end of what would be a long interrogation, the defense attorney would then refer the Secretary to the notation and ask whether it was not intended as a coded message, a written nod-and-a-wink to interrogators to the effect that they should not feel bound by the limits set in the memo, but consider themselves authorized to do what was necessary to obtain the necessary information. The memos, and the practices they authorized, threatened the entire military commission process.

Mr. Haynes listened attentively throughout. He promised to consider carefully what I had said.

I had entered the meeting believing that the December 2nd Memo was almost certainly not reflective of conscious policy but the product of oversight — a combination of too much work and too little time for careful legal analysis or measured consideration. I left confident that Mr. Haynes, upon reflecting on the abuses in Guantanamo and the flaws in the December 2nd Memo and underlying legal analysis, would seek to correct these mistakes by obtaining the quick suspension of the authority to apply the interrogation techniques.

21 Dec 02 - 3 Jan 03

On these dates I left for and returned from Miami on a family Christmas vacation. During this time, I learned via

⁵ The notation reads: "However, I stand for 8 - 10 hours a day. Why is standing limited to 4 hours?"

emails from RADM Lohr that he had brought the allegations of abuse to VADM Kevin Green, the Deputy Chief of Naval Operations for Plans, Policy, and Operations, and COL Manny Supervielle, SOUTHCOM SJA. I returned to the office on Friday, January 3, 2003.

6 Jan 03

NCIS Director Brant informed me that the detainee mistreatment in Guantanamo was continuing and that he had not heard that the December 2nd Memo had been suspended or revoked. This came as an unpleasant surprise since I had been confident that the abusive activities would have been quickly ended once I brought them to the attention of higher levels within DOD. I began to wonder whether the adoption of the coercive interrogation techniques might not have been the product of simple oversight, as I had thought, but perhaps a policy consciously adopted — albeit through mistaken analysis — and enjoying at least some support within the Pentagon bureaucracy. To get them curbed I would have to develop a constituency within the Pentagon to do so.

I met with Under Secretary of the Navy Susan Livingstone and informed her, for the first time, of the evidence of abuse in Guantanamo, my legal and policy views, and my various meetings and conversations on the matter. I recommended an NCIS brief, which she accepted. That afternoon, Director Brant and other NCIS agents briefed her along the same lines of the brief they provided me on December 18th. I attended the brief. This would be the first of almost daily conversations or meetings that I had with Under Secretary Livingstone on this issue. Her views and mine coincided, and she provided great support during this entire period.

On this and the following day, I reviewed the product of research that had been begun almost immediately following the news of the detainee abuse, in particular a memorandum of law prepared under RADM Lohr's direction by Navy JAG attorneys. (Att 5) In addition, I reviewed a letter (Att 6) dated December 26, 2002, from Kenneth Roth, the Executive Director of Human Rights Watch, a prominent human rights organization, to President Bush. The letter, which contained legal analysis I considered largely accurate, had been cited in a Washington Post article published on the same date.⁶ (Att 7) Both the letter and the article were confirmation that the accounts of

⁶ D. Priest, B. Gellman, "U.S. Decries Abuse but Defends Interrogations," Washington Post, p. A1 (Dec. 26, 2002).

prisoner abuse had begun to leak out, as they were bound to do.

8 Jan 03

I met in my office with Jaymie Durnan, a Special Assistant to Secretary Rumsfeld and Deputy Secretary Paul Wolfowitz. Showing him the December 2nd Memo, I informed Mr. Durnan about the alleged prisoner abuse at Guantanamo, the repugnance that NCIS and other U.S. officials at the base felt about the practice, and my view that the mistreatment was illegal and contrary to American values. In addition to their unlawfulness, the abusive practices — once they became known to the American public and military — would have severe policy repercussions: the public and military would both repudiate them; public support for the War on Terror would diminish; there would be ensuing international condemnation; and, as a result, the United States would find it more difficult not only to expand the current coalition, but even to maintain the one that existed. The full political consequences were incalculable but certain to be severe. I also informed Mr. Durnan of my December 20th conversation with Mr. Haynes and my surprise to learn, following my return from vacation, that the interrogation authorities had not been suspended in the intervening time. I told him I would be seeing Mr. Haynes again the following day and asked for his help in reversing the policy.

Mr. Durnan expressed serious concern over the matter and promised to look into it at his level. He asked for a copy of the December 2nd Memo, which I had delivered to him later that same day (Att 8) along, I believe, with the Navy JAG legal memo. He also asked that I keep him informed of my conversation with Mr. Haynes.

9 Jan 03

I met with Mr. Haynes in his office again that afternoon. He was accompanied by an Air Force major whose name I cannot recall. I told him that I had been surprised to learn upon my return from vacation that the detainee abuses appeared to be continuing and that, from all appearances, the interrogation techniques authorized by the December 2nd Memo were still in place. I also provided him a draft copy of the Navy JAG legal memo.

Mr. Haynes did not explain what had happened during the interval, but said that some U.S. officials believed the

techniques were necessary to obtain information from the few Guantanamo detainees who, it was thought, were involved in the 9/11 attacks and had knowledge of other al Qaeda operations planned against the United States. I acknowledged the ethical issues were difficult. I was not sure what my position would be in the classic "ticking bomb" scenario where the terrorist being interrogated had knowledge of, say, an imminent nuclear weapon attack against a U.S. city. If I were the interrogator involved, I would probably apply the torture myself, although I would do so with full knowledge of potentially severe personal consequences. But I did not feel this was the factual situation we faced in Guantanamo, and even if I were willing to do this as an individual and assume the personal consequences, by the same token I did not consider it appropriate for us to advocate for or cause the laws and values of our nation to be changed to render the activity lawful. Also, the threats against the United States came from many directions and had many different potential consequences. Does the threat by one common criminal against the life of one citizen justify torture or lesser mistreatment? If not, how many lives must the threat jeopardize? Where does one set the threshold, if at all? In any event, this was not for us to decide in the Pentagon; these were issues for national debate.

My recollection is that I raised the following additional points with Mr. Haynes:

- The December 26th Washington Post article recounting allegations of prisoner mistreatment at Guantanamo and elsewhere demonstrated that the discontent of those in the military opposed to the practice was leaking to the media, as was inevitable.
- Even if one wanted to authorize the U.S. military to conduct coercive interrogations, as was the case in Guantanamo, how could one do so without profoundly altering its core values and character? Societal education and military training inculcated in our soldiers American values adverse to mistreatment. Would we now have the military abandon these values altogether? Or would we create detachments of special guards and interrogators, who would be trained and kept separate from the other soldiers, to administer these practices?
- The belief held by some that Guantanamo's special jurisdictional situation would preclude a U.S. court

finding jurisdiction to review events occurring there was questionable at best. The coercive interrogations in Guantanamo were not committed by rogue elements of the military acting without authority, a situation that may support a finding of lack of jurisdiction. In this situation, the authority and direction to engage in the practice issued from and was under review by the highest DOD authorities, including the Secretary of Defense. What precluded a federal district court from finding jurisdiction along the entire length of the chain of command?

- The British Government had applied virtually the same interrogation techniques against Irish Republican Army detainees in the '70s. Following an exhaustive investigation in which the testimony of hundreds of witnesses was taken, the European Commission of Human Rights found the interrogation techniques to constitute torture. In *Ireland v. United Kingdom*,⁷ a later law suit brought by the victims of the interrogation techniques, the European Court of Human Rights in a split decision held that the techniques did not rise to the level of torture, but did amount to "cruel, inhuman, and degrading" treatment, a practice that was equally in violation of European law and international human rights standards. The court awarded damages. Ultimately, the then-Prime Minister, standing in the well of Parliament, admitted that the government had used the techniques, forswore their further use, and announced further investigations and remedial training. This case was directly applicable to our situation for two reasons. First, because of the similarity between U.S. and U.K. jurisprudence, the case helped establish that the interrogation techniques authorized in the December 2nd Memo constituted, at a minimum, cruel, inhuman, and degrading treatment. Further, depending on circumstances, the same treatment may constitute torture — treatment that may discomfit a prizefighter may be regarded as torture by a grandmother. Second, at present, British Prime Minister Tony Blair had lost significant electoral

⁷ *Republic of Ireland v. United Kingdom*, (Series A, No. 25) European Court of Human Rights (1979-80), 2 EHRR 25 (Jan. 18, 1978).

support and was under heavy political pressure because of his staunch support for the United States in the War on Terror and Operation Iraqi Freedom. What would be the impact on Blair's political standing upon the disclosure that his partner, the United States, was engaged in practices that were unlawful under British and European law? Could the British Government be precluded from continuing to cooperate with us on aspects of the War on Terror because doing so would abet illegal activity? Besides Blair, what impact would our actions have with respect to the willingness of other European leaders, all of whom are subject to the same law, to participate with us in the War on Terror?

- A central element of American foreign policy for decades had been our support for human rights. By authorizing and practicing cruel, inhuman, and degrading treatment, we were now engaged in the same sort of practices that we routinely condemned. Had we jettisoned our human rights policies? If not, could we continue to espouse them given our inconsistent behavior?

Mr. Haynes said little during our meeting. Frustrated by not having made much apparent headway, I told him that the interrogation policies could threaten Secretary Rumsfeld's tenure and could even damage the Presidency. "Protect your client," I urged Mr. Haynes.

After the meeting, I reported back to Mr. Durnan by email. (Att 9) Two sentences summarized my view of the meeting. Speaking of Mr. Haynes, I wrote: "He listened — as he always does — closely and intently to my arguments and promised to get back to me, but didn't say when. I've got no inkling what impact, if any, I made."

10 Jan 03

I met in my office with CAPT Jane Dalton, JAGC, USN, the Legal Adviser to the Chairman of the Joint Chiefs of Staff, who had called for the meeting at Mr. Haynes's request. I reviewed the December 2nd Memo with her, making many of the same points that I had made in my previous conversations with Mr. Haynes, Mr. Durnan, and others.

Also as a result of action by Mr. Haynes, I presented my views and objections at an afternoon meeting attended by the

other service General Counsel and the senior Judge Advocates General. My arguments were similar to those discussed above. I reported both meetings in a brief email to Mr. Durnan. (Att 10)

I regarded Mr. Haynes's initiative to schedule the above two meetings as a positive development and a sign that he not only took my arguments seriously, but that he possibly agreed with some or many of them. Later that afternoon, he called to say that Secretary Rumsfeld was briefed that day on my concerns. Mr. Haynes suggested that modifications to the interrogation policy were in the offing and could come as early as next week. I reported this to Mr. Durnan in an email. (Att 11)

13 Jan 03

In separate meetings, I met alone with Air Force General Counsel Mary Walker, Army General Counsel Steve Morello, and DOD Deputy General Counsel Dan Dell'Orto. The arguments I raised were roughly the same ones I had made to Mr. Haynes in our earlier conversations.

14 Jan 03

I met with VADM Kevin Green and gave him a full account of my concerns and objections, as well as of my meetings and conversations on the issues.

15 Jan 03

Uncertain whether there would be any change to the interrogation policy and dissatisfied at what I viewed as the slow pace of the discussions, I prepared a draft memorandum addressed to Mr. Haynes and CAPT Dalton (Att 12) providing my views on the JTF-170⁹ October 11, 2002, request (contained as part of the December 2nd Memo) requesting authority to engage in the counter-resistance interrogation techniques. My memo: (a) stated that the majority of the proposed category II and all of the category III techniques were violative of domestic and international legal norms in that they constituted, at a minimum, cruel and unusual treatment and, at worst, torture; (b) rejected the legal analysis and recommendations of the Beaver Legal Brief; and (c) "strongly non-concurred" with the adoption of the violative interrogation techniques. The memo further cautioned that even "the misperception that the U.S.

⁹ After a name change, it was now designated JTF GTMO.

Government authorizes or condones detention or interrogation practices that do not comply with our domestic and international legal obligations . . . probably will cause significant harm to our national legal, political, military and diplomatic interests."

I delivered the memo in draft form to Mr. Haynes's office in the morning. In a telephone call, I told Mr. Haynes that I was increasingly uncomfortable as time passed because I had not put down in writing my views on the interrogation issues. I said I would be signing out the memo late that afternoon unless I heard definitively that use of the interrogation techniques had been or was being suspended. We agreed to meet later that day.

In the later meeting, which Mr. Dell'Orto attended, Mr. Haynes returned the draft memo to me. He asked whether I was not aware about how he felt about the issues or the impact of my actions. I responded that I did not and, with respect to his own views, I had no idea whether he agreed totally with my arguments, disagreed totally with them, or held an intermediate view. Mr. Haynes then said that Secretary Rumsfeld would be suspending the authority to apply the techniques that same day. I said I was delighted and would thus not be signing out my memo. Later in the day and after our meeting, Mr. Haynes called to confirm that Secretary Rumsfeld had suspended the techniques. I reported the news widely, including to the Under Secretary (Att 13) and VADM Green (Att 14).

17 Jan 03

Secretary Rumsfeld, through General Counsel Haynes, established a Working Group headed by Air Force General Counsel Mary Walker to develop recommendations by January 29 on detainee interrogations. (Att 15) The sub-issues associated with the tasking were divided among the services. Navy OGC was assigned the task to develop a paper on the applicability of the 5th, 8th, and 14th Amendments to detainee interrogations. Early in this process, the Working Group was advised that the Office of Legal Counsel (OLC) in the Department of Justice would be developing a comprehensive legal memorandum that was to serve as definitive guidance on

the issues addressed by it.⁹ I appointed LtCol Rick Schieke to serve as the OGC representative to the Working Group.¹⁰

I met with NCIS Chief Psychologist Dr. Michael Gelles and senior NCIS Special Agent Mark Fallon. In the meeting, I mentioned my concern that simple opposition to the use of the coercive interrogation techniques may not be sufficient to prevail in the impending bureaucratic reexamination of which procedures to authorize. We couldn't fight something with nothing; was there anything in the scientific or academic literature that would support the use of non-coercive interrogation techniques? Dr. Gelles replied that there was. Most behavioral experts working in the field, he said, viewed torture and other less coercive interrogation tactics not only as illegal, but also as ineffective. The weight of expert opinion held that the most effective interrogation techniques to employ against individuals with the psychological profile of the al Qaeda or Taliban detainees were "relationship-based," that is, they relied on the mutual trust achieved in the course of developing a non-coercive relationship to break down the detainee's resistance to interrogation. Coercive interrogations, said Dr. Gelles, were counter-productive to the implementation of relationship-based strategies.

At my direction, Dr. Gelles began the preparation of two memos, the first to be a summary of the thesis intended to be injected as quickly as possible into the Working Group and inter-agency deliberations, and the second a comprehensive discussion of the subject. This actually would lead to the preparation of three memoranda, which are identified below on the dates they were circulated.

18 Jan - 29 Jan 03

This was the principal period for the Working Group activities. Sometime during this period, OLC delivered its draft legal memo on interrogation techniques (the "OLC Memo") to Air Force GC Walker, the chairperson of the Group. Although the lengthy memo covered many issues and did so with

⁹ By 28 C.F.R. § 0.25, the Attorney General delegated to the Office of Legal Counsel the authority to render opinions on questions of law when requested by the President or heads of executive departments pursuant to 28 U.S.C § 511-512.

¹⁰ The Working Group process generated a large volume of paper through the course of numerous meetings. I did not participate in the daily work of the group. Because its activities were well documented and a large number of participants were involved, the following narrative will focus only on the principal points of my own involvement in the process.

seeming sophistication, I regarded it as profoundly in error in at least two central elements. First, the memo explicitly held that the application of cruel, inhuman, and degrading treatment to the Guantanamo detainees was authorized with few restrictions or conditions. This, I felt, was a clearly erroneous conclusion that was at variance with applicable law, both domestic and international, and trends in constitutional jurisprudence, particularly those dealing with the 8th Amendment protections against cruel and unusual punishment and 14th Amendment substantive due process protections that prohibited conduct "shocking to the conscience." And second, the memo espoused an extreme and virtually unlimited theory of the extent of the President's commander-in-chief authority. A key underpinning to the notion that cruel treatment could be applied to the detainees, the OLC formulation of the commander-in-chief authority was wrongly articulated because it failed to apply the *Youngstown Steel* test to the Guantanamo circumstances. If applied, the test would have yielded a conclusion that the commander-in-chief authority was probably greatly attenuated in the non-battlefield Guantanamo setting. In summary, the OLC memo proved a vastly more sophisticated version of the Beaver Legal Brief, but it was a much more dangerous document because the statutory requirement that OLC opinions are binding provided much more weight to its virtually equivalent conclusions.

Soon upon receipt of the OLC Memo, the Working Group leadership began to apply its guidance to shape the content of its report. As illustrated below, contributions from the members of the Working Group, including OGC, began to be rejected if they did not conform to the OLC guidance.

30 Jan 03

In an email chain initiated by Ms. Walker, she objected to an effort by the OGC representative, which I had directed, to insert 8th Amendment analysis into the Working Group report. In my reply I sought to alert her to the mistakes in the OLC Memo's legal analysis and to its unreliability as guidance. I wrote: "The OLC draft paper is fundamentally in error: it spots some of the legal trees, but misses the constitutional forest. Because it identifies no boundaries to action — more, it alleges there are none — it is virtually useless as guidance as now drafted and dangerous in that it might give some a false sense of comfort."¹¹ Ms. Walker's response

¹¹ Ultimately, the Justice Department would apparently come to the same conclusion. In late June 2004, in the aftermath of the Abu Ghraib scandal

dismissed my warning: "I disagree and moreover I believe DOD GC disagrees." (Three emails at Att 16)

Even before this date, it became evident to me and my OGC colleagues¹¹ that the Working Group report being assembled would contain profound mistakes in its legal analysis, in large measure because of its reliance on the flawed OLC Memo. In addition, the speed of the Working Group process and the division of responsibility among the various Services made it difficult to prepare detailed comments or objections to those sections not assigned to OGC. My intent at this stage was to review the final draft report when it was circulated for clearance but, based on the unacceptable legal analysis contained in the early draft versions that were likely to be retained in the final version, I anticipated that I would non-concur with detailed comments.

4 Feb 03

Under a cover memo entitled "Proposed Alternative Approach to Interrogations," I circulated a January 31, 2003, NCIS memo entitled "An Alternative Approach to the Interrogation of Detainees at Guantanamo Bay, Cuba." This was the first of the three NCIS memos described above in the narrative entry above for 17 Jan 03. (Att 17)

Mr. Haynes convened a meeting of the Working Group principals. I believe that it was at this meeting that Mr. Haynes asked the group's opinion whether a matrix of interrogation techniques (Att 18), which used a green/yellow/red light system to indicate whether the individual technique was in conformity with U.S. law, was

— and the separate scandal generated by the offensive reasoning in the OLC Memo and another OLC brief — the Justice Department announced that it was withdrawing the OLC Memo. See, e.g., T. Lacy and J. Biskupic, "Interrogation Memo to be Replaced," *USA Today*, p. A02 (June 23, 2004).

¹² The DOW legal leadership was united in its view that the OLC Memo was rife with mistaken legal analysis. RADM Lehr, Mr. Murphy, and BGEN Sandkuhler all shared this view. For that matter, the senior leadership among DOW civilian and military attorneys shared a common view of virtually all the legal and policy issues throughout the debate on detainee interrogation. Unfortunately, because this narrative is mainly a personal account, it tends to mask the role these individuals — including OGC Deputy General Counsel Kranz and Moltzahn, Marine Corps Counsel Murphy, and NCIS Director Brant — played in the effort to correct the mistaken interrogation policies. For example, RADM Lehr and BGEN Sandkuhler were instrumental in both the legal analysis of the interrogation issue and the advocacy effort, not only within the Navy and Marine Corps but also among the other military services, to ensure that the interrogation techniques conformed to law.

correct and approved by the individuals in the room. I indicated that it was my belief that the matrix conformed to law, and I believe that everyone else in the meeting also indicated the same view.

6 Feb 03

OGC Deputy General Counsel Bill Molzahn and I met in my office with OLC Deputy Director John Yoo. The principal author of the OLC Memo, Mr. Yoo glibly defended the provisions of his memo, but it was a defense of provisions that I regarded as erroneous. Asked whether the President could order the application of torture, Mr. Yoo responded, "Yes." When I questioned this, he stated that his job was to state what the law was, and also stated that my contrary view represented an expression of legal policy that perhaps the administration may wish to discuss and adopt, but was not the law. I asked: "Where can I have that discussion?" His response: "I don't know. Maybe here in the Pentagon?"

I circulated a second version of the January 31st NCIS interrogation memo described above in the narrative entry for 4 Feb 03. This memo, the second of three memos described above in the narrative entry of 17 December 03, differed from the first only in that it contained an 11-page classified attachment that addressed the issue in much greater detail. (Att 19)

10 Feb 03

At some point in February, and most probably on this date, I met with Mr. Haynes at his request and Mr. Dell'Orto to discuss the Working Group report. I informed them that the draft report was not a quality product. It was the product of a flawed working group process and deeply flawed OLC Memo. I believe I urged him to keep the report in draft form and not finalize it. I do recall suggesting that he should take the report, thank the Working Group leadership for its efforts, and then stick the report in a drawer and "never let it see the light of day again."

26 Feb 03

Under a cover memo entitled "Proposed Interrogation Strategy," I circulated the third NCIS memo addressing recommended interrogation techniques. This classified paper constituted an academic treatment of the issue. (Att 20)

2 Mar 03

This is the date of the last Working Group report in OGC files. This draft was as unacceptable as prior drafts.

8 Mar 03

Mr. Haynes convened a meeting of the service General Counsel and the JAGs to discuss the Working Group process. During the course of this Saturday morning meeting, Secretary Rumsfeld entered the room. He thanked us for our work and stressed how important the issues were. He emphasized the need to ensure that the Group's recommendations were consistent with U.S. law and values.

27 Jun 03

I read in the Washington Post¹³ (Att 21) that Mr. Haynes had written a letter to Sen. Patrick Leahy declaring that it was the policy of the Department of Defense, in essence, never to apply torture or inflict cruel, inhuman, or degrading treatment on its prisoners or detainees. I regarded the letter (Att 22), which was dated June 25, 2003, as the perfect expression of the legal obligations binding DOD and the happy culmination of the long debates in the Pentagon as to what the DOD detainee treatment policy should be. I wrote an email to Mr. Haynes (Att 23) expressing my pleasure on his letter and stating that I was proud to be on his team.

I should note that neither I, OGC, nor — to my knowledge — anyone else in the DON ever received a completed version of the Working Group report. It was never circulated for clearance. Over time, I would come to assume that the report had never been finalized.¹⁴

Epilogue

The issue of detainee interrogation has three principal components: (1) the legal analysis that creates a boundary limiting interrogation tactics and techniques; (2) the

¹³ P. Slevin, "U.S. Pledges to Avoid Torture," Washington Post, p. A11 (June 27, 2003).

¹⁴ I learned otherwise only on May 12, 2004, when I called Air Force Deputy General Counsel Dan Ramos to advise him that I had heard references to the report in televised congressional hearings on the Abu Ghraib scandal. Mr. Ramos informed that it in fact had been signed out and briefed to SOUTHCOM Commander GEN Hill and JTF GTMO Commander MGEN Miller in March or April 2003.

policies adopted following the identification of the legal limits; and (3) the actual effects on the detainees. This is how I viewed each of these areas — law, policy, and detainee treatment — in the Guantanamo context in the period after the events described above.

Law. To my knowledge, the two principal DOD documents that address the legal aspects of detainee interrogation are DOD GC Haynes's June 25, 2003, letter to Sen. Leahy, which I view as the definitive and appropriate statement on the legal boundaries to detainee interrogation and treatment, and the Working Group Report. Because I viewed the Report as inconsistent with the Haynes Letter, I would be concerned to the extent that the legal analysis in the Report is still regarded as valid.¹⁵ However, since the Department of Justice has publicly announced that they have withdrawn the OLC Memo,¹⁶ I would regard — and I should assume DOD would also regard — the Working Group Report that so heavily relied on the OLC Memo as no longer serving as any kind of appropriate guidance on the issues.

Policy. To my knowledge, all interrogation techniques authorized for use in Guantanamo after January 15, 2003, fell well within the boundaries authorized by law. Certainly the interrogation matrix discussed at pages 18-19 above also fell within appropriate boundaries.

Detainee Treatment. NCIS advised me, following Secretary Rumsfeld's January 15, 2003, suspension of the interrogation authorities contained in the December 2nd Memo, that the reports of detainee abuses at Guantanamo had ceased. At no subsequent time, up to and including the present, did NCIS or any other person or organization forward to me any report of further detainee abuse. Because of NCIS's demonstrated integrity and ability to detect detainee abuse at Guantanamo, I felt a high degree of confidence that the prisoner abuses at Guantanamo had indeed stopped after January 15, 2003.



Alberto J. Mora

¹⁵ Apparently, it was also used as the legal analysis informing the Secretary of Defense's April 2003 renewed guidance memo to JTF GTMO on interrogation techniques (of which I was also not aware until May 2004).

¹⁶ See, footnote 11 above.

Attachments:

1. JTF-Gitmo Interrogation Logs/Notes (S)
2. DOD GC Action Memo of 27 Nov 02 w/SECDEF note of 2 Dec 02 and/supporting docs (S)
3. OPNAV memo N3/N5L NPM 466-02 of 4 Nov 02 to J-5
4. RADM Lohr e-mail to Alberto Mora of 19 Dec 02 (U)
5. JAG Memo of Law of 16 Jan 03 (S)
6. Human Rights Watch ltr of 26 Dec 02 (U)
7. Washington Post article "U.S. Decries Abuse but Defends Interrogations" 26 Dec 02 (U)
8. Alberto Mora e-mail of 9 Jan 03 8:29 to Jaymie Durnan (U)
9. Alberto Mora e-mail of 9 Jan 03 4:15 to Jaymie Durnan (U)
10. Alberto Mora e-mail of 10 Jan 03 1:19 to Jaymie Durnan (U)
11. Alberto Mora e-mail of 10 Jan 03 4:53 to Jaymie Durnan (U)
12. U.S. Navy General Counsel Counter-Resistance Techniques draft memo (S)
13. Alberto Mora e-mail of 17 Jan 03 to Susan Livingstone (U)
14. Alberto Mora e-mail of 17 Jan 03 to VADM Green (U)
15. Mary Walker memo to Detainee Interrogation Working Group, dtd 17 Jan 03 (S)
16. E-mails (3) between Alberto Mora and Mary Walker of 29-30 Jan 03 (U)
17. Alberto Mora memo re Proposed Alternative Approach to Interrogations, dtd 4 Feb 03 (S)
18. Matrix of Detainee Interrogation Techniques (S)
19. Alberto Mora memo re Proposed Alternative Approach to Interrogations dtd, 6 Feb 03 (S)
20. Alberto Mora memo re Proposed Interrogation Strategy, dtd 26 Feb 03 (S)
21. Washington Post article "U.S. Pledges to Avoid Torture" 27 Jun 03. (U)
22. Mr. Haynes ltr to Sen. Leahy of 25 Jun 03 (U)
23. Alberto Mora e-mail of 27 Jun 03 to Mr. Haynes (U)

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Wednesday, March 15, 2006 1:17 PM
To: [REDACTED]

Subject: US v. al Sharbi - Summary of 8-5 Conference

U.S. v. al SHARBI
8-5 Conference Summary
28 Feb 2006

1. A conference was held at the request of the PO to receive a status update on Detailed Defense Counsel (DDC) concerns expressed in his 15 Feb 06 email about access to his client and difficulty establishing an attorney-client relationship. With the consent of the parties, the following personnel were present:

LT Kuebler, Detailed Defense Counsel (DDC)
Mr. Rachlin, Civilian Defense Counsel
COL Sullivan, Chief Defense Counsel
LT [REDACTED] Prosecutor (Pros)
CPT [REDACTED] Prosecutor
COL [REDACTED] JTF representative
LTC [REDACTED] JTF representative
Mr. Harvey, Clerk of Commissions
Mr. Hodges, Assistant to the Presiding Officer

2. DDC indicated that he has requested to meet with the accused, but the accused has not yet consented to meet him. To encourage the accused to meet with him, DDC obtained a letter from the accused's father and delivered it to the accused. Despite having the letter, the accused has not yet agreed to meet with DDC. However, in a letter to LT Kuebler, the accused indicated a desire to meet with his father. LT Kuebler represented that he has worked closely and cooperatively with the accused's father, who is willing to travel to GTMO to meet with his son. DDC's expectation is that the father will affirmatively encourage the accused to accept representation by DDC and that this would likely be a significant factor in providing a favorable environment in which LT Kuebler can further attempt to meet with the accused and establish an attorney-client relationship with him.

3. The JTF representatives indicated that, in order to meet with counsel, the accused is required to move from his present location, because his present location is not conducive to a visit by counsel. Security arrangements and the configuration of the physical facilities were not designed with counsel visits in mind. Facilities are available elsewhere that are appropriate for visits with counsel and the accused is authorized to use those facilities, however, the accused has thus far not been willing to go to those facilities.

4. The JTF representatives confirmed that, in an effort to facilitate a meeting between DDC and the accused, MGEN Hood met with the accused. DDC confirmed that he understood the accused had a favorable reaction to the visit and that it was during this visit that the accused passed the letter to the MGEN, for deliver to DDC, indicating his desire to meet with his father.

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5. MGEN Hood provided assurances to LT Kuebler that if a visit with the accused's family is arranged by the defense, the JTF will extend its support to facilitating the visit at Guantanamo Bay. JTF representatives emphasized that necessary arrangements, which are external to the JTF, such as travel and visas, were the responsibility of the defense.

6. DDC acknowledged travel arrangements, visas and other arrangement external to the JTF were defense responsibilities and he indicated that he was working on those arrangements. JTF representatives indicated that, consistent with MGEN Hood's offer, JTF will facilitate a meeting with family members in conjunction with a session of the commission in the commission building. DDC had no objection to the venue for the meeting, but questioned the efficacy of first meeting the accused only minutes before his first appearance before the commission. JTF representatives provided DDC with a primary point of contact (LCDR [REDACTED]) for coordinating the family visit.

7. In addition to facilitating a visit by family members, the JTF representatives indicated that they were prepared to facilitate a phone call from a family member to the accused. Such a phone call would be permitted, provided it was initiated from the U.S. Embassy or a similar government facility, where the caller's ID could be verified and further provided that the call was monitored. DDC acknowledged this offer, but indicated he needed to consider further whether such a call would be helpful.

8. The PO asked if there was anything else the DDC wished to request of the JTF in order to facilitate his meeting with the accused. DDC had no other requests.

10. The parties agreed to proceed as follows:

a. Defense:

1 – DDC will provide a request to the Prosecution, to LCDR [REDACTED] of the JTF staff, and to the PO for such delay as the DDC deems necessary in order to facilitate a family visit for the accused.

2 – In support of that request for delay, DDC will provide to the Prosecution and to the PO a plan of action with milestones needed to accomplish a family visit.

3 – DDC requested that the session scheduled for 28 Feb 2006 be delayed, pending consideration of the broader request for delay to accomplish a family visit.

b. Prosecution:

1 – In reply to any request for delay, the Prosecution will coordinate with the JTF staff and provide a written response to the defense and to the PO.

2 – The Prosecution indicated they are prepared to proceed with a session as scheduled on 28 Feb 2006, but did not object to a delay of that session in order to consider and respond to the defense's broader request for delay.

c. JTF Staff:

1 – JTF Staff agreed to develop and to submit to the prosecution and to the defense a support plan for the family visit, beginning with Day-1 as the day the family arrives in Guantanamo Bay.

2 – JTF Staff reiterated that they will facilitate a phone call between the accused and his family, under

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the conditions noted.

11. The Assistant will make this document, and the following items, a Review Exhibit:

a. Email from LT Kuebler of 15 Feb (Update email), APO email of 15 Feb setting the 8-5 conference, 22 Feb email from LT Kuebler with other developments, and 22 Feb APO reply. This document is a single thread of emails.

b. APO email of 14 March SUBJ: First Session in US v. al Sharbi, and LT Kuebler's reply and attachment forwarded with that reply.

/s/

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

Hodges, Keith

From: Kuebler, William, LT, DoD OGC [REDACTED]
Sent: Wednesday, February 22, 2006 9:59 AM
To: 'Hodges, Keith'; Kuebler, William, LT, DoD OGC
Cc: [REDACTED]

Subject: RE: Contact issues: U.S. v. al Sharbi - 8-5 Conference at GTMO

Sir,

1. In order to bring you up to date on events occurring since our last e-mail exchange and request further appropriate action concerning this matter, the following information is provided:

2. Major General Hood (Commander, JTF GTMO) personally contacted Colonel Sullivan last Friday to discuss the difficulties I have encountered in attempting to establish contact with Mr. al Sharbi. MG Hood said that he would himself attempt to persuade Mr. al Sharbi to meet with me, that I should be prepared to travel to Miami at a moment's notice, and that JTF would do whatever was necessary to get me from Miami to GTMO ASAP. Accordingly, I made travel arrangements in anticipation of travel to GTMO early this week, but learned over the weekend, via e-mail from LTC [REDACTED] that despite MG Hood's efforts, Mr. al Sharbi had refused to meet with me. Nonetheless, a number of positive indications did come out of MG Hood's discussions with Mr. al Sharbi as related to Col. Sullivan. Specifically, MG Hood indicated that Mr. al Sharbi reacted positively when MG Hood mentioned that I might be able to facilitate a meeting or other contact with Mr. al Sharbi's family. MG Hood indicated that Mr. al Sharbi's family would only be permitted to travel to GTMO if authorized by appropriate authority (i.e., the Department of State), but ensured that they would be well-treated in the event they are permitted to travel to GTMO. As I may have mentioned previously, I have been in contact with Mr. al Sharbi's family in Saudi Arabia. His father has been very cooperative and has offered his support and assistance in attempting to obtain his son's agreement to meet and cooperate with counsel in connection with military commission proceedings. Accordingly, I do not believe that I will have exhausted all reasonable efforts to establish a relationship with Mr. al Sharbi unless and until I am permitted to pursue this particular course of action (again, I believe that similar consideration has been afforded to prospective counsel in another case originally scheduled to go forward next week). Although I will work to facilitate a meeting between Mr. al Sharbi and his family at the earliest possible date, even with MG Hood's gracious offer of support, I don't see any way such a meeting can take place by next week. I am, however, hopeful that such a meeting could take place sometime in March, before the next anticipated "trial term" in GTMO.

3. As I have said before, I believe the "worst case scenario" for my formation of an effective attorney-client relationship with Mr. al Sharbi would consist of a forced meeting immediately (even a day or two) prior to the initial session of the commission. Even if I am able to meet with Mr. al Sharbi in some form or fashion next week, I consider it extremely unlikely that I will obtain his consent to represent him and be prepared to go forward next week. Moreover, the prospect of an initial session as early as next week may adversely influence the manner in which I engage with him in our initial meeting(s), i.e., I may be compelled to "rush" the formation of a relationship, a concern to which you directed my attention during our January conference call.

4. Based on the foregoing, and in order to spare all parties the logistical hardship in preparing for and attending a session next week, I respectfully request the PO to order a delay in the commencement of commission proceedings until, tentatively, the April "trial term" in GTMO. This is *not* a request for postponement of the "8-5" session directed by the PO to take place in GTMO on 28 Feb 06.

VR, WCK

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Wednesday, February 15, 2006 17:20
To: Kuebler, William, LT, DoD OGC; Hodges, Keith
Cc: [REDACTED] Davis, Morris, COL, DoD OGC; Sullivan, Dwight, COL, DoD OGC;
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Subject: Contact issues: U.S. v. al Sharbi - 8-5 Conference at GTMO

1. CAPT O'Toole has directed that I send the addresses the following instructions. The Chief Defense Counsel, Chief Prosecutor, and LT Kuebler are requested to acknowledge receipt.
2. At 0900, 28 February, at the Commissions building at Guantanamo Naval Base, the Presiding Officer will hold an 8-5 conference for the purpose of discussing issues concerning the Defense's access to Mr. al Sharbi raised in LT Kuebler's email. The time may be adjusted to accommodate attendees, but the conference needs to be held on that day. The focus of the discussions will not be the past except as necessary to work for a systemic solution for the future.
3. The Presiding Officer desires the following persons to be present:
 - a. All defense counsel on the case. Mr Rachin is invited to attend.
 - b. Prosecutors on the case.
 - c. The Chief Defense Counsel and the Chief Prosecutor.
 - d. A representative from the JTF SJA office (preferably the SJA.)
 - e. Those personnel from JDOG and/or JTF necessary to discuss how LT Kuebler might have contact with his client under the circumstances. These persons should be of sufficient position that they can "make happen" those arrangements that might be agreed upon.
3. The Chief Defense counsel is requested to ensure that the necessary logistical arrangements have been made so that LT Kuebler will be at this conference. Further, the Chief Defense Counsel is requested to extend an invitation to Mr. Rachin to attend, and if he wishes to attend, to make the necessary arrangements.
4. The Chief Prosecutor is requested to identify and notify those persons listed in paragraph 3b, 3d and 3e above and coordinate their presence. Authority to speak for the command is the key with respect to 3e.
5. The Defense in al Sharbi perform those steps to request a visit with Mr al Sharbi on 1 **AND** 2 March in the event that the 8-5 results in suitable arrangements for the Defense to visit the client. (There is no point in missing this opportunity to visit with the client while counsel are already at GTMO.)
6. If any clarification is necessary, please advise me immediately.
7. The date for the initial session in US v. al Sharbi remains unchanged.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

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From: Kuebler, William, LT, DoD OGC [REDACTED]
Sent: Wednesday, February 15, 2006 4:05 PM
To: 'Hodges, Keith'
Cc: [REDACTED]

Subject: U.S. v. al Sharbi

Sir,

Pursuant to your request for an update as to my status NLT 15 Feb 06, the following information is provided:

On 17 Jan 06, I submitted a written request, via e-mail, to [REDACTED] asking for the prosecution's assistance in facilitating a face-to-face meeting with Mr. al Sharbi, i.e., one that would not require his consent to be moved to a different camp. I specifically asked to be taken to see Mr. al Sharbi on 5 Feb 06. LT [REDACTED] agreed to discuss the request with the JTF. Shortly before departing for GTMO, I called LT [REDACTED] to ascertain the status of the request. He informed me that the JTF would "assist in any way they can," or words to that effect, but that I would not be allowed to see Mr. al Sharbi in his cell.

Mr. Rachlin and I traveled to GTMO on 4 Feb 06. We met with LCDR [REDACTED] Deputy SJA, JTF GTMO, on the morning of 5 Feb 06. LCDR [REDACTED] confirmed that we would not be permitted to see Mr. al Sharbi in his cell and then chastised us for not "arranging to see" Mr. al Sharbi with his office - a strange remark in light of the prosecution's agreement to help facilitate a meeting for 5 Feb 06 and the JTF's knowledge and refusal of our request. LCDR [REDACTED] then said that he would see what he could do about setting up a meeting the next day, 6 Feb 06.

On the morning of 6 Feb 06, I received an e-mail from LCDR [REDACTED] indicating that JTF personnel had attempted to move Mr. al Sharbi for a meeting with counsel and that he had refused. Later that day, I met with the JTF SJA, LTC [REDACTED] and reiterated my desire to be taken to see Mr. al Sharbi in his cell. LTC [REDACTED] said that I would not be permitted this type of access to Mr. al Sharbi, citing concerns over "camp dynamics" as a basis - specifically, he noted a concern that if I were now taken to see Mr. al Sharbi contrary to his expressed desire not to meet with me, Mr. al Sharbi might use his influence with other detainees to create "problems" for the staff. I subsequently met with the JTF Commander, Major General Hood, at his request. MG Hood agreed to use the good offices of the JTF cultural advisor, and possibly even meet with Mr. al Sharbi himself, in order to persuade Mr. al Sharbi to meet with me.

Upon return to the D.C. area and relocation to new spaces occasioned by the flooding of our offices, on 10 Feb 06, I located and reviewed discovery materials provided by the prosecution while I was TDY/TAD. Included were statements from LTC [REDACTED] and the JTF cultural advisor describing the prosecution's service of charges on Mr. al Sharbi in Nov 05 - approximately two weeks after my first visit to GTMO. At the time, Mr. al Sharbi was participating in a hunger strike and was being detained in a medical facility with other detainees. The prosecutor serving charges was allowed to enter the facility, along with the cultural advisor and the SJA. Mr. al Sharbi was told that there were two men who needed to "speak with him in private." He consented, was wheeled outside the facility and served with his charges.

I should note that when I traveled to GTMO the first time, in mid-Nov 05, and Mr. al Sharbi reportedly "refused" to meet with me, I specifically asked LCDR [REDACTED] and LTC [REDACTED] if it would be possible to see Mr. al Sharbi in the medical facility. I was told that I would not be allowed to enter the facility, and moreover, that such action would be imprudent because there would be no way to accomplish a meeting outside the view of the other detainees, thereby creating the appearance that Mr. al Sharbi was somehow "cooperating" with the government. In view of the aforementioned statements, it appears that this is not true and that the JTF staff, had they been so inclined, could have provided me with precisely the same type of access, in a somewhat confidential setting, as they provided to the prosecution. In addition, after I became aware of the fact that Mr. al Sharbi had been served in some manner by the prosecution within the medical facility, I recall discussing the matter with LCDR [REDACTED] LCDR [REDACTED] distinguished the prosecution visit, indicating that prior to meeting with the prosecution, Mr. al Sharbi was informed as to the purpose of their visit and that he had somehow agreed or consented to a meeting in order to be

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served. I believe LCDR [REDACTED] repeated this claim when I met with him in GTMO last week. The sworn statements provided in discovery, however, do not support the contention that Mr. al Sharbi was aware of why he was being taken out of the medical facility before he was served. Rather, they indicate that the prosecution was allowed to establish contact in precisely the manner I suggested in my 17 Jan 06 e-mail to LT [REDACTED]. I am certainly not accusing LCDR [REDACTED] of intentionally deceiving me - I believe it more likely that he was mistaken. His comments are, however, reflective of the fact that I have not been extended the same courtesy as the prosecution.

As things stand, I have not met with Mr. al Sharbi and cannot provide any information with respect to his desires concerning counsel, whether he wishes to proceed pro se, and/or whether he is presently competent to make these determinations. Although he has reportedly expressed an unwillingness to meet with me, I have no personal knowledge as to how "invitations" to meet with me have been presented or exactly how he has responded. Moreover, it appears that absent outside intervention, the JTF will continue to disparately treat the prosecution and defense in this case.

Based on the foregoing, I must respectfully request additional time (until at least the April trial term) before the commencement of commission proceedings in this case in order to continue my efforts to establish an attorney-client relationship with Mr. al Sharbi. I recently submitted a request to the JTF to permit Mr. al Sharbi's father and mother to telephone or visit him in an effort to encourage his cooperation with counsel (it is my understanding that delay for similar reasons was recently provided to counsel in another case). I hope to receive a response to this request soon. My fear is that if commission proceedings commence, as currently scheduled, the week of 27 Feb 06, Mr. al Sharbi will be moved, with or without his consent (likely the latter), to the commission building and that my first meeting with him will take place moments before we go on the record and discuss his elections concerning counsel. My hope is to avoid an "involuntary" meeting through the intervention of Mr. al Sharbi's family, or (less likely) the JTF cultural advisor. However, if these efforts are unsuccessful, the JTF persists in its refusal to provide me with access to Mr. al Sharbi in the camp, and our first meeting must be a "forced" meeting of some type, I think it would be far better, and far more likely to eventually yield a positive result, if the meeting took place well in advance of the "initial session" in Mr. al Sharbi's case.

If the JTF permits Mr. al Sharbi to have contact with his family, I will endeavor to arrange for such contact at the earliest possible date. I currently plan to travel to GTMO the week of 27 Feb and attempt again to meet with Mr. al Sharbi.

VR, WCK

Hodges, Keith

From: Kuebler, William, LT, DoD OGC [REDACTED]
Sent: Tuesday, March 14, 2006 12:45 PM
To: [REDACTED]
Subject: RE: First Session in US v. al Sharbi
Attachments: Request for telephone contact between accused and Family.pdf

Sir,

1. I contacted LCDR [REDACTED] before leaving GTMO the week of our 8-5. He indicated that it would be best to have some idea of a timeline before working out the details of a plan for a visit by Mr. al Sharbi's parents. Shortly after returning to my office, I contacted Mr. al [REDACTED] father to confirm his willingness to travel to Cuba. He indicated that only he (not Mr. al [REDACTED] mother) would be coming. I also contacted Ms. [REDACTED] Victim-Witness Coordinator for the Office of the Appointing Authority. Ms. Loftus graciously offered to provide support in obtaining necessary clearances for Mr. al Sharbi to travel to Cuba for the initial session in his son's case.
2. In the meantime, in response to the Presiding Officer's direction to consider whether I wanted to arrange a telephone call, I have come to the conclusion that it would be best to arrange a telephone call at the earliest opportunity. Ms. [REDACTED] once again, has graciously offered to assist. I provided her with a written request (addressed to the Appointing Authority) this morning, asking that Mr. al Sharbi be permitted to telephone his parents at the U.S. Consulate in Jeddah (the request is attached).
3. Finally, I am making arrangements for a trip to Jeddah, Saudi Arabia, the week of 10 April. Assuming all goes as anticipated with respect to the phone call and Mr. al Sharbi, Sr.'s planned travel to Cuba, my trip may be unnecessary, however, given the logistical hurdles involved, I wanted to start making appropriate arrangements in the event it appears that my traveling to Saudi Arabia will be beneficial in achieving the desired result in this matter.
4. In short, I believe I am making progress towards the objectives for which the Presiding Officer granted delay in this case, and am optimistic after speaking with Ms. Loftus that everything can be in place for an initial session the week of 24 April. Accordingly, I would ask that the Presiding Officer not schedule an initial session prior to that week.

VR, WCK

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Tuesday, March 14, 2006 08:37
To: [REDACTED]
Subject: First Session in US v. al Sharbi

LT Kuebler, the Presiding Officer desires an update that answers the below. Please do this as soon as you can.

1. Please provide a quick update on where you are in terms of meeting/working with Mr. al Sharbi and discussing his counsel choices?

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2. Is there any reason the Presiding Officer should not hold a session during the week of:

- a. 3 Apr.
- b. 24 Apr.

Please advise soonest.

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

[REDACTED]

13 Mar 06

From: LT William C. Kuebler, JAGC, USN, Detailed Defense Counsel
To: Mr. John D. Altenberg, Jr., Appointing Authority for Military Commissions

Subj: REQUEST FOR TELEPHONE CONTACT BETWEEN ACCUSED AND FAMILY

Ref: (a) Military Commission Instruction No. 4
(b) Military Commission Instruction No. 8
(c) Phonecon w/ Ms. Karen Loftus of 9 Mar 06

1. Pursuant to reference (a), on or about 14 November 2005, I was detailed to represent Ghassan Abdullah Al-Sharbi, a Saudi national held at Naval Station Guantanamo Bay, Cuba, in connection with a charge referred for trial by Military Commission. Mr. Al-Sharbi has, however, declined repeated invitations to meet with me. As a result, I do not currently have an attorney-client relationship with Mr. Al-Sharbi, and fear significant impairment of my ability to represent him in the event he does not ultimately accept my representation and am I ordered to represent him in connection with Commission proceedings.

2. The Presiding Officer in Mr. Al-Sharbi's case originally scheduled an initial session for 1 March 2006. At a conference conducted pursuant to paragraph 5 of reference (b) (an "8-5 conference"), on 28 February 2006, I obtained a delay in the commencement of Commission proceedings to coordinate travel by Mr. Al-Sharbi's parents to Cuba in connection with the initial session of his Commission. As I explained to the Presiding Officer, I have been in contact with Mr. Al-Sharbi's father, who resides in Jeddah, Saudi Arabia. He has been very cooperative and has expressed his willingness to encourage his son to cooperate with counsel in this case. It is my hope that Mr. Al-Sharbi will respond positively to this encouragement. In addition, at the 8-5 conference, representatives of the Joint Task Force, Guantanamo Bay, indicated that it would be possible to arrange for a telephone call between Mr. Al-Sharbi and his family, provided the family is willing to travel to a nearby U.S. Embassy or Consulate. I was directed to consider whether I wanted to arrange a telephone call in addition to a visit. After giving the matter consideration and discussing it with Mr. Al-Sharbi's father, I believe it would be best to arrange for telephone contact between Mr. Al-Sharbi and his parents before a visit. There is a U.S. Consulate in Jeddah, Saudi Arabia, at which they can readily receive a telephone call from their son.

3. In light of the foregoing, and pursuant to reference (c), I respectfully request your assistance in facilitating telephone contact between Mr. Al-Sharbi and his parents at the earliest possible date. The purpose of the telephone call would be for Mr. Al-Sharbi's parents to speak with their son and encourage him to work with his detailed counsel to conduct a zealous defense in his Commission case. Participants in the telephone call would include [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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4. Should you have any questions or concerns regarding this request, please contact me at [REDACTED]


W. C. KOEBLER

Hodges, Keith H CIV USSOUTHCOM JTFGTMO

From: Kuebler, William, LT, DoD OGC [REDACTED]
Sent: Wednesday, March 15, 2006 2:01 PM
To: [REDACTED]

Subject: RE: US v. al Sharbi - Summary of 8-5 Conference

Sir,

Thank you for the summary. Upon review, there are just a few additional items that I would request to be made part of the record concerning the 28 Feb 06 8-5:

- (1) Col. Davis was absent from the conference notwithstanding the PO's request that he attend.
- (2) Mr. Rachlin, although admitted to the pool of qualified civilian counsel is not, at present, Mr. al Sharbi's "Civilian Defense Counsel" - he currently represents Mr. al Sharbi (through Mr. al Sharbi's "next friend") in habeas proceedings.
- (3) We discussed the circumstances of the prosecution's service of charges on Mr. al Sharbi and I noted my concern that detailed defense counsel had not received the same level of consideration as received by the prosecution with respect to matters of "access."
- (4) I directed the PO's attention to the fact that a Criminal Investigation Task Force agent had gained access to and attempted to interview Mr. al Sharbi on 16 Jan 06.
- (5) The APO indicated that he had spoken with employees of the Bureau of Prisons to ascertain whether BoP had any procedures for dealing with situations such as the one presented by Mr. al Sharbi's reported refusal to meet with counsel.

If it is too late to include these items in the summary, I would respectfully request that this e-mail be made a review exhibit and attached to the record of trial. Thank you.

VR, WCK

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Wednesday, March 15, 2006 13:17
To: [REDACTED]

Subject: US v. al Sharbi - Summary of 8-5 Conference

U.S. v. al SHARBI
8-5 Conference Summary
28 Feb 2006

1. A conference was held at the request of the PO to receive a status update on Detailed Defense Counsel (DDC) concerns expressed in his 15 Feb 06 email about access to his client and difficulty establishing an attorney-client relationship. With the consent of the parties, the following personnel were present:

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4/25/2006

LT Kuebler, Detailed Defense Counsel (DDC)
Mr. Rachlin, Civilian Defense Counsel
COL Sullivan, Chief Defense Counsel
LT [REDACTED] Prosecutor (Pros)
CPT [REDACTED] Prosecutor
COL [REDACTED] JTF representative
LTC [REDACTED] JTF representative
Mr. Harvey, Clerk of Commissions
Mr. Hodges, Assistant to the Presiding Officer

2. DDC indicated that he has requested to meet with the accused, but the accused has not yet consented to meet him. To encourage the accused to meet with him, DDC obtained a letter from the accused's father and delivered it to the accused. Despite having the letter, the accused has not yet agreed to meet with DDC. However, in a letter to LT Kuebler, the accused indicated a desire to meet with his father. LT Kuebler represented that he has worked closely and cooperatively with the accused's father, who is willing to travel to GTMO to meet with his son. DDC's expectation is that the father will affirmatively encourage the accused to accept representation by DDC and that this would likely be a significant factor in providing a favorable environment in which LT Kuebler can further attempt to meet with the accused and establish an attorney-client relationship with him.

3. The JTF representatives indicated that, in order to meet with counsel, the accused is required to move from his present location, because his present location is not conducive to a visit by counsel. Security arrangements and the configuration of the physical facilities were not designed with counsel visits in mind. Facilities are available elsewhere that are appropriate for visits with counsel and the accused is authorized to use those facilities, however, the accused has thus far not been willing to go to those facilities.

4. The JTF representatives confirmed that, in an effort to facilitate a meeting between DDC and the accused, MGEN Hood met with the accused. DDC confirmed that he understood the accused had a favorable reaction to the visit and that it was during this visit that the accused passed the letter to the MGEN, for deliver to DDC, indicating his desire to meet with his father.

5. MGEN Hood provided assurances to LT Kuebler that if a visit with the accused's family is arranged by the defense, the JTF will extend its support to facilitating the visit at Guantanamo Bay. JTF representatives emphasized that necessary arrangements, which are external to the JTF, such as travel and visas, were the responsibility of the defense.

6. DDC acknowledged travel arrangements, visas and other arrangement external to the JTF were defense responsibilities and he indicated that he was working on those arrangements. JTF representatives indicated that, consistent with MGEN Hood's offer, JTF will facilitate a meeting with family members in conjunction with a session of the commission in the commission building. DDC had no objection to the venue for the meeting, but questioned the efficacy of first meeting the accused only minutes before his first appearance before the commission. JTF representatives provided DDC with a primary point of contact (LCDR [REDACTED]) for coordinating the family visit.

7. In addition to facilitating a visit by family members, the JTF representatives indicated that they were prepared to facilitate a phone call from a family member to the accused. Such a phone call would be permitted, provided it was initiated from the U.S. Embassy or a similar government facility, where the caller's ID could be verified and further provided that the call was

monitored. DDC acknowledged this offer, but indicated he needed to consider further whether such a call would be helpful.

8. The PO asked if there was anything else the DDC wished to request of the JTF in order to facilitate his meeting with the accused. DDC had no other requests.

10. The parties agreed to proceed as follows:

a. Defense:

1 - DDC will provide a request to the Prosecution, to LCDR [REDACTED] of the JTF staff, and to the PO for such delay as the DDC deems necessary in order to facilitate a family visit for the accused.

2 - In support of that request for delay, DDC will provide to the Prosecution and to the PO a plan of action with milestones needed to accomplish a family visit.

3 - DDC requested that the session scheduled for 28 Feb 2006 be delayed, pending consideration of the broader request for delay to accomplish a family visit.

b. Prosecution:

1 - In reply to any request for delay, the Prosecution will coordinate with the JTF staff and provide a written response to the defense and to the PO.

2 - The Prosecution indicated they are prepared to proceed with a session as scheduled on 28 Feb 2006, but did not object to a delay of that session in order to consider and respond to the defense's broader request for delay.

c. JTF Staff:

1 - JTF Staff agreed to develop and to submit to the prosecution and to the defense a support plan for the family visit, beginning with Day-1 as the day the family arrives in Guantanamo Bay.

2 - JTF Staff reiterated that they will facilitate a phone call between the accused and his family, under the conditions noted.

11. The Assistant will make this document, and the following items, a Review Exhibit:

a. Email from LT Kuebler of 15 Feb (Update email), APO email of 15 Feb setting the 8-5 conference, 22 Feb email from LT Kuebler with other developments, and 22 Feb APO reply. This document is a single thread of emails.

b. APO email of 14 March SUBJ: First Session in US v. al Sharbi, and LT Kuebler's reply and attachment forwarded with that reply.

/s/

DANIEL E. O'TOOLE

CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

UNITED STATES

v.

SALIM AHMED HAMDAN – Case No. 04-0004

UNITED STATES

v.

DAVID MATTHEWS HICKS – Case No. 04-0001

Appointing Authority
Decision on
Challenges for Cause

Decision No. 2004-001

October 19, 2004

Initial hearings were held in each of the above cases at Guantanamo Bay, Cuba, on August 24 and 25, 2004, respectively, during which voir dire was conducted.¹ In both cases, counsel for both sides reviewed detailed written questionnaires completed by each commission member, conducted voir dire of the commission as a whole, and then conducted extensive individual voir dire of the presiding officer, each of the four commission members, and the one alternate member.² Some of the commission members were also individually questioned by counsel in closed session so that classified matters could be examined.³ In both the *Hamdan* and *Hicks* cases, defense counsel challenged the Presiding Officer, three of the four commission members, and the alternate commission member. During the hearings, the prosecution opposed all the challenges in both cases. However, in a subsequent brief filed by the Chief Prosecutor, the prosecution modified their position and no longer opposes the challenges for cause against Colonel (COL) B (a Marine),⁴ Lieutenant Colonel (LTC) T, and LTC C.

¹ The initial hearing in *United States v. al Bahlul*, Case No. 04-0003, was held on August 26, 2004, at Guantanamo Bay, Cuba. The proceedings in that case were suspended prior to voir dire to resolve the accused's request to represent himself. The initial hearing in *United States v. al Qosi*, Case No. 04-0002, was held on August 27, 2004, at Guantanamo Bay, Cuba. Voir dire in that case is scheduled to be conducted in November 2004.

² By comparison, in the Nazi Saboteur Military Commission conducted during World War II, defense counsel asked only two questions of the commission as a whole and conducted no individual voir dire. There were no challenges for cause. See Transcript of Proceedings before the Military Commissions to Try Persons Charged with Offenses Against the Law of War and the Articles of War, Washington D.C., July 8-31, 1942, transcribed by the University of Minnesota, 2004, available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm at pp. 13-14.

³ To what extent voir dire is conducted during any military commission is a matter within the discretion of the Presiding Officer. "The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate . . . [and shall ensure that] any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member." DoD Military Commission Instruction No. 8, "Administrative Procedures," paragraph 3A(2) (Aug. 31, 2004) [hereinafter MCI No. 8]. The Presiding Officer permitted extensive, wide-ranging voir dire in both of these cases. There was no objection by any counsel that the Presiding Officer impeded in any way their ability to conduct full and extensive voir dire of all the members, including the Presiding Officer.

⁴ The final commission member, COL B (an Air Force officer), was not challenged by either side in either case. All further references to COL B herein refer to COL B, the Marine.

In each case, the Appointing Authority considered the trial transcript, the written briefs of the parties, the written questionnaires completed by the members, and the written recommendations of the Presiding Officer. While each case is decided on the record of trial in that case, this joint decision is provided because of the close similarities in the voir dire of the members and the arguments of counsel in both cases. Additionally, defense counsel from the *al Qosi* case has also filed a brief concerning the proper standard for the Appointing Authority to apply when deciding challenges for cause.

Military Commission Procedural Provisions on Challenges for Cause

The Appointing Authority appoints military commission members "based on competence to perform the duties involved" and may remove members for "good cause." DoD Directive No. 5105.70, "Appointing Authority for Military Commissions," paragraph 4.1.2 (Feb. 10, 2004) [hereinafter DoD Dir. 5105.70]. See also DoD Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," Section 4A(3) (Mar. 21, 2002) [hereinafter MCO No. 1]; MCI No. 8 at paragraph 3A(1). To be qualified to serve as a member or an alternate member of a military commission, each person "shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty." MCO No. 1 at Section 4A(3). Compare Article 25(a), Uniform Code of Military Justice, 10 U.S.C. § 825(a) [hereinafter UCMJ].

The Presiding Officer may not decide challenges for cause but must "forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue."⁵ MCI No. 8 at paragraph 3A(3). In the *Hamdan* and *Hicks* cases, consistent with this authority, the Presiding Officer has scheduled due dates for motions, motion hearing dates, and tentative trial dates pending the Appointing Authority's decision on these challenges.

"In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that proceedings simply continue without the member, or convene a new commission." MCI No. 8 at paragraph 3A(1).

The term "good cause" is not defined in any of these provisions but is defined in the Review Panel instruction as including, but not limited to, "physical disability, military exigency, or other circumstances that render the member unable to perform his duties."

⁵ On September 15, 2004, the Appointing Authority sent the following email to the Presiding Officer: "Please forward your observations and recommendations relating to challenges for cause." That same day, the Presiding Officer provided written recommendations concerning the recommended standard for deciding challenges for cause and his recommendations on the challenges against each member in the *Hamdan* and *Hicks* cases.

DoD Military Commission Instruction No. 9, "Review of Military Commission Proceedings," paragraph 4B(2) (Dec. 26, 2003). This is the same definition of good cause that a convening authority or a military judge uses to excuse a court-martial member after assembly of the court. See Manual for Courts-Martial, United States, Rules for Courts-Martial 505 (2002) [hereinafter RCM].

Parties' Positions Concerning the Standard for Determining Challenges for Good Cause

At the request of the Presiding Officer, defense counsel in *Hamdan*, *Hicks*, and *al Qosi*, as well as the Chief Prosecutor, filed briefs concerning the appropriate standard for the Appointing Authority to apply when deciding challenges for "good cause." The defense briefs in *Hicks* and *al Qosi* advocate the adoption of the standard set forth in RCM 912(f) including the "implied bias" provision which states that a member shall be excused for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the [military commission] free from substantial doubt as to legality, fairness, and impartiality." RCM 912(f)(1)(N). While making some different arguments in support of their position, defense counsel in *Hicks* and *al Qosi* advocate that the RCM 912(f)(1)(N) court-martial standard should be applied without change in military commissions. Under this standard, implied bias is determined via a supposedly objective standard, the test being whether a reasonable member of the public would have substantial doubt as to the legality, fairness, and impartiality of the proceeding. See *United States v. Strand*, 59 M.J. 455, 458-59 (2004). Defense counsel in *Hamdan* agree that the RCM 912(f)(1)(N) court-martial standard should be applied to military commissions, but argue that the reasonable member of the public must be taken from the international community.

The brief filed by the Chief Prosecutor recommends the following standard be adopted: "A member shall be disqualified when there is good cause to believe that the member cannot provide the accused a full and fair trial, or the member's impartiality might reasonably be questioned based upon articulable facts."

The Presiding Officer recommends that a challenge for cause should be granted "if there is good cause to believe that the person could not provide a full and fair trial, impartially and expeditiously, of the cases brought before the Commission. I do not believe that there is an 'implied bias' standard in the relevant documents establishing the Commissions." (Mem. for Appointing Authority, Military Commissions at paragraph 2, Sept. 15, 2004.)

The parties cite no controlling standard for deciding challenges for cause before military commissions. Nevertheless, it is helpful to examine the challenge standards in courts-martial, United States federal practice, and under international practice when deciding the appropriate challenge standard for military commissions.

Applicability of the Uniform Code of Military Justice and the Manual for Courts-Martial to Military Commissions

As explained below, while some of the provisions of the UCMJ expressly apply to military commissions, none of the provisions of the Manual for Courts-Martial, including the implied bias standard endorsed by defense counsel, apply to military commissions. Article 21 of the UCMJ provides:

§ 821. Art. 21 Jurisdiction of courts-martial not exclusive

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.⁶

UCMJ art. 21. Article 36 of the UCMJ states:

§ 836. Art. 36 President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, *military commissions* and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter* [10 U.S.C. §§ 801-946].

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

UCMJ art. 36 (emphasis added). In 1990, the phrase “and shall be reported to Congress” was deleted from the end of subsection (b). See National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Section 1301, 104 Stat. 1301 (1990).

⁶ As recently as November 22, 2000, less than one year before the 9/11 attacks, Congress again recognized the independent jurisdiction of military commissions. See Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523 (adding a section entitled “Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States,” 18 U.S.C. § 3261 (2000)). 18 U.S.C. § 3261(c) states that “[n]othing in this chapter [18 U.S.C. §§ 3261 et seq.] may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.” *Id.*

Consistent with this Congressional authority, on November 13, 2001, the President entered the following finding:

Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833, Section 1(f) (Nov. 16, 2001) [hereinafter President's Military Order].

Accordingly, the Manual for Courts-Martial does not apply to trials by military commissions because of the congressionally authorized finding in the President's Military Order. However, the President's statutory authority to promulgate different trial rules for military commissions is not unlimited. Military commission trial procedures must comply with two statutory conditions contained in the Uniform Code of Military Justice. First, all such rules and regulations shall be "uniform insofar as practicable." UCMJ art. 36(b).

Second, any such rule or regulation "may not be contrary to or inconsistent with" the Uniform Code of Military Justice. UCMJ art. 36(a). Most of the UCMJ's provisions specifically apply to courts-martial only, but some also expressly apply to military commissions as well. For example, Articles 21 (jurisdiction), 28 (court reporters and interpreters), 37(a) (unlawful command influence), 47 (refusal to appear or testify), 48 (contempts), 50 (admissibility of records of courts of inquiry), 104 (aiding the enemy), and 106 (spies) all expressly apply to military commissions.

Article 41 of the UCMJ discusses challenges for cause, but is expressly applicable only to trials by court-martial and does not prescribe the standard to use when deciding a challenge for "cause." See UCMJ art. 41(a)(1). Article 29 of the UCMJ provides that no member of a court-martial may be excused after the court has been assembled "unless excused as a result of a challenge, excused by the military judge *for physical disability or other good cause*, or excused by order of the convening authority for good cause." UCMJ art. 29(a) (emphasis added).

In historical military jurisprudence, a general statement or assertion of bias was not a proper challenge. The challenge had to allege specific facts and circumstances demonstrating the basis of the alleged bias. See generally William Winthrop, *Military Law and Precedents* 207 (Government Printing Office 1920 reprint) (1896). Challenges

“for favor,” as implied bias challenges were historically known, did not, by themselves, imply bias.

[T]he question of their sufficiency in law being wholly contingent upon the testimony, *which may or may not, according to the character and significance of all the circumstances raise a presumption of partiality*. Such are challenges founded upon the personal relations of the juror and one of the parties to the case; their relationship, when not so near as to constitute [actual bias]; the entertaining by the juror of a qualified opinion or impression in regard to the merits of the case; his having an unfavorable opinion of the character or conduct of the prisoner; his having taken part in a previous trial of the prisoner for a different offence, or of another person for the same or a similar offence; or some other incident, no matter what . . . which, alone or in combination with other incidents, may have so acted upon the juror that his mind is not ‘in a state of neutrality’ between the parties.

Id. at 216 (emphasis added). In such cases, the question of whether the member is or is not biased “is a question of *fact* to be determined by the particular circumstances in evidence.” *Id.* at 216-17 (emphasis in original).

Challenges for Cause in United States Federal Courts

In federal practice, the seminal case on implied bias is *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (boldface added):

[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury **capable and willing to decide the case solely on the evidence before it**, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

In an often cited concurring opinion, Justice O’Connor writes that:

While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the

juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

Id. at 222.

The doctrine of implied bias is "limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Brown v. Warden*, No. 03-2619, 2004 U.S. App. LEXIS 13944, at 3 (3rd Cir. July 6, 2004 unpublished) (quoting *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988)). "The implied bias doctrine is not to be lightly invoked, but 'must be reserved for those extreme and exceptional circumstances that leave serious question whether the trial court subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.'" *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1261 (2d Cir. 2000) (quoting *Gonzales v. Thomas*, 99 F.3d 978, 987 (10th Cir. 1996)).

Military courts-martial practice also purports to follow the *Smith* Supreme Court precedent, with the highest military appellate court concluding that "implied bias should be invoked rarely." See *United States v. Warden*, 51 M.J. 78, 81 (2000); see also *United States v. Lavender*, 46 M.J. 485, 488 (1997) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). In practice, however, the U. S. Court of Appeals for the Armed Forces has been more liberal in granting implied bias challenges than the various U.S. Federal Circuit Courts of Appeals. But even in courts-martial, military appellate courts look at the "totality of the factual circumstances" when reviewing implied bias challenges. See *United States v. Strand*, 59 M.J. 455, 459 (2004).

The American Bar Association recently proposed a minimum standard for deciding challenges for good cause:

At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, or may be unable or unwilling to hear the subject case fairly and impartially. . . . In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate.

American Bar Association, Standards Relating to Jury Trials, Draft, September 2004.

International Standards for Challenges for Cause

International law generally provides for the right of an accused to an impartial tribunal. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) statutorily establish impartiality as a judicial requirement. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 13, U.N. Doc. S/25704, 32 ILM 1159, 1195 (May 3, 1993); Statute of the International Criminal Tribunal for Rwanda, art. 12, U.N. Doc. S/Res/955, U.N. SCOR 3453, 33 ILM 1598, 1607 (Nov. 8, 1994). The Rules of Evidence and Procedure of both the ICTY and ICTR state that “[a] judge may not sit on a trial . . . in which he has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality.” Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Rule 15, U.N. Doc. IT/32/Rev. 32 (Aug. 12, 2004); Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 15, U.N. Doc. ITR/3/REV. 1 (June 29, 1995).

Several international treaties and conventions recognize the right to an impartial tribunal. The European Convention on Human Rights and the International Covenant on Political and Civil Rights guarantee the accused a fair trial and recognize the right to an impartial tribunal. In nearly identical language, the standards in both documents require a criminal tribunal to be fair, public, independent, and competent. See European Convention on the Protection of Human Rights and Fundamental Freedoms, art. 6, Section 1, *opened for signature*, 213 UNTS 221 (Nov. 4, 1950); International Covenant on Political and Civil Rights, art. 14, Section 1, 999 UNTS 171 (Dec. 16, 1966).

The European Court of Human Rights has reviewed numerous cases for alleged violations of the right to an impartial tribunal or judge. In evaluating impartiality, the Court consistently emphasizes that judges and tribunals must appear to be impartial. *Piersack v. Belgium*, Series A, No. 53 (Oct. 1, 1982). In *Piersack v. Belgium*, the Court noted that a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view. *Id.* at para. 30(a). The European Court of Human Rights affirmed this consideration in *Gregory v. United Kingdom*, stating that “[t]he Court notes at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public . . .” *Gregory v. United Kingdom*, 25 Eur. H.R. Rep. 577, para. 43 (Feb. 25, 1997). As a result of an overriding need to maintain an appearance of impartiality, national legislation often establishes specific relationships or perceived conflicts that disqualify a judge on the basis of appearances rather than an objective finding that a judge is indeed impartial.

In evaluating whether there is an appearance of impartiality that gives rise to a challenge of a judge or juror, the European Court of Human Rights noted that lack of impartiality includes situations where there is a “legitimate doubt” that a juror or judge can act impartially. *Piersack*, Series A, No. 53 at para. 30. Further, it is necessary to “examine whether in the circumstances there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury . . .” *Gregory*, 25 Eur. H.R. Rep. at para. 45. Despite this seemingly expansive approach, the European

Court of Human Rights has ruled consistently that a judge is presumed to be impartial unless proven otherwise. *LeCompte, van Leuven and De Meyeres v. Belgium*, Series A, No. 43 (June 23, 1981). Thus, as a practical matter, it is the rare case in which the impartiality of a judge is successfully challenged on the basis of a judge's relationship to others when such relationship is not specifically enumerated as a disqualifying factor under national legislation.

The Appeals Chamber for the International Criminal Tribunal for Rwanda has exhaustively analyzed the European Court of Human Rights cases, as well as cases from common law states, and developed the following standard to interpret and apply the concept of impartiality:

[A] Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

- A. A judge is not impartial if shown that actual bias exists.
- B. There is an unacceptable appearance of bias if:
 - i. a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties . . . ; or
 - ii. the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

Prosecutor v. Furundzija, para. 189, Case No. I IT-95-17/1-A, Judgment, (July 21, 2000).

The Appeals Chamber noted that an informed observer is one who takes into account the oath, as well as any training and experience of the juror. On the basis of this test, the Appeals Chamber found no violation, holding that the judge's membership in an international organization was one of the very factors that qualified her as a judge at the Tribunal and thus such membership could not be the basis for a claim of bias. The Chamber also noted that judges may have personal convictions that do not amount to bias absent other factors. *Id.* at para. 203.

Appointing Authority Standard for Deciding Challenges for Cause

The President's Military Order establishes the trial standard that military commissions will provide "a full and fair trial, with the military commission sitting as the triers of both fact and law." President's Military Order at Section 4(c)(2). Considering all of the above, the Appointing Authority will apply the following standard, which includes a limited implied bias component, when deciding challenges for cause against any member of a military commission:

Based on the totality of the factual circumstances, a challenge for cause will be sustained if the member has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by commission law to serve on the commission, or may be unable or unwilling to hear the case fairly and impartially considering only evidence and arguments presented in the accused's trial.

In applying this standard, a member should be excused if the record establishes a reasonable and significant doubt concerning his or her ability to act fairly and impartially. Additionally, the following factors will be considered, although the existence of any one of these factors is not necessarily an independent ground warranting the granting of a challenge and no one factor necessarily carries more weight than another. In each case the challenge will be decided based upon the above standard, taking into account any of these factors that may be applicable and considering the totality of the factual circumstances in the case.

- (1) Has the moving party established a factual basis to support the challenge?
- (2) Does the non-moving party oppose the challenge?
- (3) What recommendation, if any, did the Presiding Officer make concerning the challenge? *See* MCI No. 8 at paragraph 3A(3).
- (4) Does the record demonstrate that the challenged member possesses sufficient age, education, training, experience, length of service, judicial temperament, independence, integrity, intelligence, candor, and security clearances, and is otherwise competent to serve as a member of a military commission? *See* MCO No. 1 at Sections 4A(3)-(4); DoD Dir. 5105.70 at paragraph 4.1.2; UCMJ art. 25(d)(2).
- (5) Does the record establish that the challenged member is able to lay aside any outside knowledge, association, or inclination, and decide the case fairly and impartially based upon the evidence presented to the commission? *See Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961) (citations omitted).

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Examples of good cause that would normally warrant a member's removal from a military commission include situations where the member does not meet the qualifications to sit on or has not been properly appointed to a military commission; has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged; has become physically disabled; or has intentionally disclosed protected information from a referred military commission case without proper authorization.

Consideration of Individual Challenges

LTC C

The defense challenges to LTC C are based upon his ongoing strong emotions and anger because of 9/11 and his real and present apprehension that his family may be harmed if he participates in these commissions. At trial, the prosecution opposed this challenge. However, the post-hearing brief filed by the Chief Prosecutor does not oppose this challenge. The Presiding Officer believes that there is "some cause" to grant a challenge against LTC C because his responses would provide a reasonable person cause to doubt his ability to provide an impartial trial.

During his voir dire in *Hamdan*, LTC C acknowledged that he indicated in his written questionnaire that he had a desire to seek justice for those who perished at the hands of the terrorists, that he was very angry about the events of 9/11, and that he still had strong emotions about what happened. LTC C further stated that he believed terrorist organizations would seek out both he and his family for revenge simply because of his participation in these commissions. He also stated that at one point he held the opinion that the persons being detained at Guantanamo Bay were terrorists.

During his voir dire in *Hicks*, LTC C stated that he would try to put his emotions aside and look at the case objectively. He reaffirmed that he had participated in discussions with other soldiers where he probably stated that all of the detainees at Guantanamo Bay were terrorists, but that in retrospect that was no longer his opinion.

LTC C's past statements concerning the detainees at Guantanamo, coupled with his ongoing strong emotions concerning the 9/11 attacks, create a reasonable and significant doubt as to whether he could lay aside his emotions and judge the evidence presented in these cases in a fair and impartial manner. Accordingly, based on the totality of the factual circumstances, the challenge for cause against LTC C will be granted.

COL S



attended his funeral and met with his family. COL S also visited Ground Zero about two weeks after the attack [REDACTED]
[REDACTED]

The defense challenges to COL S are based upon his emotional reaction when visiting Ground Zero as well as his attendance at the funeral [REDACTED]
[REDACTED] The prosecution opposed this challenge at trial. The post-hearing brief filed by the Chief Prosecutor also opposes this challenge, without elaboration.

The Presiding Officer's written recommendation is that there is no cause to grant a challenge against COL S:

His voir dire did not reveal any information which might cause a reasonable person to believe that he could not provide a full and fair trial, impartially and expeditiously. His method of speaking, his deliberation when responding, his ability to understand not only the question but the subtext of the question - all of these show that he is a bright attentive officer who will be able to provide the unbiased perspective which is required by the President for this trial. Even if one were to accept an "implied bias" standard, there was nothing in the voir dire to cause a reasonable person to believe that he is in any way biased in these cases. Based on my personal observations of COL S [] while he was discussing the death of [REDACTED] he was not unduly affected by the individual death - he regretted the death, but he has had a long career during which he has had occasion to see many Marines die.

In the *Hamdan* record, COL S described his reaction to attending the funeral of [REDACTED]
[REDACTED]

I have been a battalion commander. I have been a regimental commander. I have been in the Marine Corps 28 years. It is not the first Marine that, unfortunately, that I have seen die, whether he was on or off duty in the Marine Corps. The death of every Marine I have known or served with has a deep affect on me, but it is no different that -- that Marine's worth is no more or less than the other Marines, unfortunately, that I have served with who have been killed.

In the *Hamdan* record, COL S described his emotions while visiting Ground Zero:
"It is a sad sight. A lot of destruction there. Hard to fathom what was there and what

was left. . . . I would imagine that everyone who saw it was angry." COL S stated that he did not still think about his visit to Ground Zero.

In the *Hicks* record, COL S described his emotions while visiting Ground Zero as sadness rather than anger, again noting that there was a lot of destruction and loss of life. COL S responded as follows when asked how he would separate his 9/11 feelings and personal experiences from the evidence presented at trial:

COL S: It's separate things.

DC: Can you just explain for us how you go about doing that. Because we -- you understand that we need to know and be confident that you can be a fair commissioner, separate those things out, and give Mr. Hicks the fair trial that he's due and that we understand that you understand is your responsibility.

COL S : I understand. I've read these charges. I understand that the fact that anybody's charged with anything doesn't [im]ply more than that they're charged with it. And I make no connection in my mind between those charges and my visit to the World Trade Center.

DC: Nothing further, thank you.

COL S's written questionnaire and his voir dire in *Hicks* both indicate that, for a non-attorney, COL S has considerable prior military legal experience. COL S stated that he had previously served as both a witness and a member (juror) in courts-martial; that he has served as a special court-martial convening authority on [REDACTED] different occasions; and has attended specialized military legal training in the form of Senior Officer's Legal Courses and a Law of Land Warfare Course. He also conducted numerous summary courts-martial where he made determinations of both law and fact, just as members of military commissions are required to do.

As the defense stated in their brief in the *Hicks* case, "most Americans, and possibly all military personnel, are gripped by strong emotion, whether sadness, anger, confusion, frustration, fear, or revenge, at the memory of the September 11th attacks" The issue, however, is not whether a potential military commission member experienced a strong emotional reaction to events that happened over three years ago, or even whether that person candidly acknowledged such feelings, but rather is the member still experiencing those emotions such that he is unable to lay aside those feelings and render a verdict based solely on the evidence presented to the military commission. As the United States Supreme Court has stated:

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best

qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*

Irvin, 366 U.S. at 722-23 (citations omitted) (emphasis added).

Unlike LTC C, nothing in either record demonstrates that COL S is experiencing any ongoing emotions as a result of his 9/11 experiences. The Presiding Officer's recommendation states that there was nothing in COL S's demeanor during voir dire that indicated that he was unduly affected by the death of [REDACTED] COL S, who has considerable legal training and experience, clearly stated that he can and will try these cases without reference to his 9/11 experiences. Nothing in either record creates a reasonable and significant doubt as to COL S's ability to decide these cases fairly and impartially, considering only evidence and arguments presented to the commissions. Accordingly, the challenge for cause against COL S will be denied.

LTC T and COL B

The defense challenged both LTC T and COL B based upon their involvement with [REDACTED] at the time Mr. Hamdan and Mr. Hicks were apprehended.

The defense challenged LTC T based upon his role as an [REDACTED] officer on the ground in [REDACTED] from approximately [REDACTED] the period during which both Mr. Hamdan and Mr. Hicks were captured and detained. At trial, the prosecution opposed this challenge. The post-hearing brief filed by the Chief Prosecutor does not oppose this challenge.

The Presiding Officer concluded that there is cause to grant a challenge against LTC T because:

"his activities [REDACTED] make his participation problematic in regards to his knowledge of activities in the [REDACTED] - thereby possibly impacting on his impartiality. He, in fact, was a person who could legitimately be viewed as a possible victim in this case. Removing LTC T [] would insure [REDACTED] and the [REDACTED]"

modus operandi of both sides would not have an undue influence upon the deliberations of the panel.”

During his voir dire in *Hamdan*, LTC T stated that he is an [REDACTED] officer who was assigned to a [REDACTED] that deployed both to [REDACTED] as part of [REDACTED] and to [REDACTED] as part of [REDACTED] with the mission to capture enemy personnel, but that he was not involved with the capture of Mr. Hamdan. He stated that it is possible that he may have seen [REDACTED] on Mr. Hamdan, but he has no memory of Hamdan’s case. During his voir dire in *Hicks*, LTC T stated he was attached to a [REDACTED] as an [REDACTED] while deployed to [REDACTED]

During a closed session of trial, the *Hamdan* defense counsel challenged COL B based upon his role in transporting [REDACTED]. In the open session, defense challenged COL B based on the appearance of unfairness because of his prior duty [REDACTED]. During both open and closed sessions of trial, the *Hicks* defense counsel challenged COL B because his knowledge of [REDACTED] specifically his knowledge of the transportation of detainees, is such that he would be better suited to be a witness than a commission member, and further that his links with personnel in theater were such that he could be characterized as a victim.

At trial, the prosecution opposed the challenge against COL B. The post-hearing brief filed by the Chief Prosecutor does not oppose this challenge. The Presiding Officer’s opinion is that there is no cause to grant a challenge against COL B.

In his written questionnaire, COL B indicated that on 9/11 he was newly assigned as the [REDACTED] e, [REDACTED]. As a result of 9/11, he was involved in developing and executing war plans [REDACTED]. He also indicated that he was intimately familiar with [REDACTED]. [REDACTED] He was physically deployed to [REDACTED].

During voir dire, COL B stated that he was not involved in making the determinations of what detainees were eligible for transfer to Guantanamo [REDACTED]. He specifically remembered Mr. Hicks’ name and that he was Australian. He stated that he probably knew which U.S. forces captured Mr. Hicks, but cannot currently recall that information. He also stated that in his role [REDACTED].

Based on the totality of the factual circumstances, including the classified voir dire of LTC T and COL B which were reviewed but not discussed herein, the challenges for cause against both LTC T and COL B will be granted. Both officers were actively involved in planning or executing sensitive [REDACTED] in both [REDACTED] and [REDACTED] and are intimately familiar with the operations and deployments in [REDACTED]

[REDACTED] These experiences create a reasonable and significant doubt as to the ability of these two members to decide these cases fairly and impartially.

Presiding Officer

Hamdan's defense counsel challenged the Presiding Officer on four grounds:

- (1) He is not qualified as a judge advocate based on being recalled from retired service and not being an active member of any Bar Association at the time he was recalled;
- (2) As an attorney, he will exert improper influence over the other non-attorney members;
- (3) Multiple contacts, in person or through his assistant, with the Appointing Authority thus creating the appearance of unfairness; and
- (4) Previously formed an opinion on the accused's right to a speedy trial as expressed in a July 15, 2004, meeting with counsel from both the prosecution and the defense.

Hicks' defense counsel challenged the Presiding Officer on the same four general grounds. At trial, the prosecution in both cases opposed the challenge against the Presiding Officer. In a subsequent brief, the Chief Prosecutor recommended the Presiding Officer evaluate whether he should remain on the commission in light of the implied bias standard proposed by the prosecution as previously described herein.

Presiding Officer's Judge Advocate Status

Military Commission Order No. 1 requires that the "Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force." MCO No. 1 at Section 4A(4). The Presiding Officer's written questionnaire, dated August 18, 2004, indicates that he currently is, and has been, an associate member of the Virginia State Bar since 1977 and that he has never practiced law in the civilian sector.

In a written brief, Hamdan's defense counsel asserts the following:

1) All Army judge advocates are required to remain in good standing in the bar of the highest court of a state of the United States, the District of Columbia, or a Federal Court. U.S. Dep't of Army Reg. 27-1, "Judge Advocate Legal Services," para. 13-2h(2) (Sept. 30, 1996) [hereinafter AR 27-1].

2) The Virginia State Bar maintains four classes of membership: active, associate, judicial, and retired. Associate members are entitled to all the privileges of active members except that they may not practice law (in Virginia).

3) Because the Presiding Officer is only an associate member of the Virginia Bar, he is not authorized to practice law in the Army Judge Advocate General's Corps.

In Virginia, the term "good standing" applies to both associate and active members and refers to whether or not the requirements to maintain that specific level of membership have been met. *Unauthorized Practice of Law*, Virginia UPL Opinion 133 (Apr. 20, 1989), available at http://www.vsb.org/profguides/upl/opinions/upl_ops/upl_Op133. "Good standing" generally means that the attorney has not been suspended or disbarred for disciplinary reasons and has complied with any applicable rules concerning payment of bar membership dues and completion of continuing legal education requirements.

As the proponent of AR 27-1, The Judge Advocate General (TJAG) of the Army is the appropriate authority to determine whether associate membership in the Virginia Bar constitutes "good standing" as contemplated in that regulation. The record establishes that the Presiding Officer's status with the Virginia Bar has not changed since he was admitted to the Virginia Bar in 1977. The record also shows that, as an associate member of the Virginia Bar, he practiced as an Army judge advocate for twenty-two years, including ten years as a military judge. Prior to his service as a military judge, the Army TJAG personally certified the Presiding Officer's qualifications to be a military judge as required by the Uniform Code of Military Justice. See UCMJ art. 26(b). Accordingly, this challenge is without merit.

Undue Influence over Non-attorney Members of the Commission

Under the President's Military Order, the commission members sit as "triers of both fact and law." President's Military Order at Section 4(c)(2). The defense asserts that this particular Presiding Officer will use his experience as a military trial judge and attorney to exert undue influence over the non-attorney members of the commission when deciding questions of law. In *Hamdan*, the Presiding Officer addressed this issue with the members as follows:

Members, later I am going to instruct you as follows: As I am the only lawyer appointed to the commission, I will instruct you and advise you on the law. However, the President has directed that the commission, meaning all of us, will decide all questions of law and fact. So you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in

court, or in motions. In closed conferences, and during deliberations, my vote and voice will count no more than that of any other member. Can each member follow that instruction?

Apparently so.

Is there any member who believes that he would be required to accept, without question, my instruction on the law?

Apparently not.

The exceptional difficulty and pressure with being the first Presiding Officer to serve on a military commission in over 60 years cannot be overstated. The Presiding Officer must conduct the proceedings with independent and impartial guidance and direction in a trial-judge-like manner. At the same time, the Presiding Officer must ensure that the other non-attorney members of the commission fully exercise their responsibilities to have an equal vote in all questions of law and fact. There is nothing in either record that remotely suggests that this Presiding Officer does not understand the delicate balance that his responsibilities require. Accordingly, the challenge on this basis is without merit.

Relationship with the Appointing Authority Creates Appearance of Unfairness

The precise factual basis for challenge on this ground was not very well articulated by counsel in either *Hamdan* or *Hicks*. In *Hamdan*, the defense counsel's entire oral argument on this ground was as follows:

We are also challenging based on the multiple contacts that you have had, either through your assistant, or through yourself, with the [A]ppointing [A]uthority. I understand that you said that this is not going to influence you in any way. We believe that it creates the appearance of unfairness, and at least at that level, we challenge on that.

Defense counsel in *Hamdan* did not further articulate a factual basis for this challenge in their post-hearing brief.

In *Hicks*, defense counsel orally adopted the same challenge grounds as *Hamdan* including "the relationship with the appointing authority" and the "perception of the public" under the implied bias standard in RCM 912(f)(1)(N). Defense counsel in *Hicks* did not further articulate a factual basis for this challenge in their post-hearing brief, even though they individually and rather extensively discussed the factual basis for their challenges against the other four challenged members.

The gist of this challenge appears to be that defense counsel perceive that a close personal friendship exists between the Presiding Officer and the Appointing Authority,

and that the Presiding Officer will be viewed as, or act as, an agent of the Appointing Authority rather than an independent, impartial Presiding Officer. Alternately stated, the Appointing Authority will somehow appear to influence the performance of the Presiding Officer. To evaluate this challenge, it is necessary to understand the traditional social and professional relationships between a convening authority and officer members of courts-martial under the Uniform Code of Military Justice, as well as the criminal sanctions against unlawfully influencing the action of a member of a court-martial or a military commission.

In addition to duty or professional responsibilities, military officers of all grades, and often their spouses, are expected by custom and tradition to participate in a wide variety of social functions hosted by senior commanding officers or general officers. Such functions include formal New Year's Day receptions, formal Dining Ins (dinners for officers only), formal Dining Outs (dinners for officers and spouses/dates), formal Dinner Dances, Change of Command ceremonies, promotion ceremonies, award ceremonies, informal Hail and Farewell dinners (welcoming new officers and "roasting" departing officers), retirement ceremonies, and funerals of members of the unit. Because attendance at all such social functions is customary, traditional, and expected, such attendance is not indicative of close personal friendships among the participants.

In most cases, commanders who are authorized to convene general courts-martial under the UCMJ are high-ranking general or flag officers. *See generally* UCMJ art. 22. The eligible "jury pool" of officers for a general court-martial includes officers assigned or attached to the convening authority's command or courts-martial jurisdiction. The convening authority is required to select officers for courts-martial duty, who, in his personal opinion, are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ art. 25(d)(2). Consequently, convening authorities frequently select as court members officers who they know well and whose judgment they trust.

To ensure that these professional and social relationships between convening authorities and court members do not affect the impartiality or fairness of trials by courts-martial or military commissions, and to maintain the neutrality of the convening authority, Congress enacted Article 37(a), UCMJ, "Unlawfully influencing action of court."⁷ This is one of the UCMJ articles that expressly applies to military commissions. This statute prohibits any "attempt to coerce, or by any authorized means, influence the

⁷ UCMJ art. 37(a) states in pertinent part (emphasis added):

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

action of [a] . . . military tribunal or any member thereof, in reaching the findings or sentence in any case." UCMJ art. 37(a). Additionally, the knowing and intentional violation of the procedural protection afforded by Article 37(a), UCMJ, is a criminal offense in that any person subject to the UCMJ who "knowingly and intentionally fails to enforce or comply with any provision of this chapter [10 U.S.C. §§ 801-946] regulating the proceedings before, during, or after trial of an accused" may be punished as directed by a court-martial. UCMJ art. 98(2). The Presiding Officer, as a retired Regular Army officer recalled to active duty, and the Appointing Authority, as a retired member of the Regular Army, are both persons subject to trial by court-martial under the UCMJ. See UCMJ art. 2(a)(1),(4).

Article 37(a), UCMJ, protects not only the impartiality of courts-martial and military commissions, but also the judicial acts of a convening authority (appointing authority). "A convening authority must be impartial and independent in exercising his authority The very perception that a person exercising this awesome power is dispensing justice in an unequal manner or is being influenced by unseen superiors is wrong." *United States v. Hagen*, 25 M.J. 78, 86-87 (C.M.A., 1987) (Sullivan, J., concurring) (citations omitted). Even though a convening authority decides which cases go to trial, he or she must remain neutral throughout the trial process. See, e.g. *United States v. Davis*, 58 M.J. 100, 101, 103 (C.A.A.F. 2003) (stating that a convicted servicemember is entitled to individualized consideration of his case post-trial by a neutral convening authority). The Appointing Authority for Military Commissions, as an officer of the United States appointed by the Secretary of Defense pursuant to the Constitution and Title 10, United States Code, has a legal and moral obligation to execute the President's Military Order in a fair and impartial manner, consistent with existing statutory and regulatory guidance.

In his written questionnaire for counsel, the Presiding Officer stated the following about his relationship with the Appointing Authority (emphasis added):

b. Mr. Altenburg:

1. I first met (then) CPT Altenburg in the period 1977-1978, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.

2. To the best of my knowledge and belief, I did not see or talk to Mr. Altenburg again until sometime in the spring of 1989 at the Judge Advocate Ball in Heidelberg. Later, in November-December 1990, (then) LTC Altenburg obtained Desert Camouflage Uniforms for [another judge] and me so that we would be properly outfitted for trials in Saudi Arabia.

3. During the period 1992 to 1995, (then) COL Altenburg was the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg while I was the Chief Circuit Judge, 2nd Judicial Circuit, with duty station at Fort Bragg. Our offices were in the same building. My wife, (then) MAJ M [], was the Chief of Administrative Law in the SJA office from 1992 to 1994. During this period, Mr. Altenburg and I became friends. We saw each other about twice a week and sometimes more than that. We generally attended all of the SJA social functions. He and his wife (and children – depending upon which of his children were in residence at the time) had dinner at our house at least three times in the three years we served at Fort Bragg. I attended several social functions at his quarters on post. *Though he was a convening authority and I was a trial judge, we were both disciplined enough to not discuss cases. I am sure there were times when he was not pleased with my rulings.*

4. From summer 1995 to summer 1996 when Mr. Altenburg was in Washington and I was at Fort Bragg, he and I probably talked on the telephone three or four times. I believe that he stayed at my house one night during a TDY to Fort Bragg (but I am not certain).

5. During the period June 1996 to May 1999, I was stationed at Mannheim, Germany and Mr. Altenburg was in Washington. Other than the World-Wide JAG Conferences in October of 1996, 1997, and 1998, I did not see nor talk to MG Altenburg except once--in May of 1997, I attended a farewell [ceremony] hosted by MG Altenburg for COL John Smith. In May 1999, MG Altenburg presided over my retirement ceremony at The Judge Advocate General's School and was a primary speaker at a "roast" in my honor that evening.

6. *Since my retirement from the Army on 1 July 1999, Mr. Altenburg has never been to our house and we have never been to his.* From the time of my retirement until the week of 12 July 2004, I have had the occasion to speak to him on the phone about five to ten times. I had two meetings or personal contacts with him during that period. First, in July or August 2001 when I was a primary speaker at a "roast" in MG Altenburg's honor at Fort Belvoir upon the occasion of his retirement. Second, in November (I believe) 2002, I attended his son's wedding in Orlando, Florida [near the Presiding Officer's home].

7. I sent him an email in December 2003 when he was appointed as the Appointing Authority to congratulate him. I also sent him an email in the spring of 2004 when I heard that he had named a Presiding Officer. Sometime in the spring of 2004, I called his house to speak to his wife. After we talked, she handed the phone to Mr. Altenburg. He explained that setting up the office and office procedures was tough. I suggested that he hire a former JA Warrant Officer whom we both knew.

8. *To the best of my memory, Mr. Altenburg and I have never discussed anything about the Commissions or how they should function. Without doubt, we have never discussed any case specifically or any of the cases in general. I am certain that since being appointed a Presiding Officer we have had no discussions about my duties or the Commission Trials.*

The voir dire in *Hamdan* did not pursue the nature of any personal relationship between the Presiding Officer and the Appointing Authority. During his voir dire in *Hicks*, the Presiding Officer stated the following concerning his relationship with the Appointing Authority (emphasis added):

DC: Now, I want to explore your relationship with the appointing authority.

PO: Okay.

DC: You have known Mr. Altenburg [since] 1977, 1978?

PO: Yes, sometime in that frame.

DC: And you had a professional affiliation for a period of time?

PO: As I said before my knowledge of Mr. Altenburg up until 1992 was minimal, I mean, really. Now he was the SJA of the 1AD, the 1st Armored Division, and I was over on the other side of Germany. We were at Bragg at the same time, but like I said I maybe talked to him once, I think. You see people on post, but that is about it. He and I were on the same promotion list to major, but he had already left Bragg by then. In 92 he came to Bragg as the SJA and I was the chief circuit judge with my offices right there at Bragg in his building, and my wife was his chief of [Administrative Law]. So from 92 to 96 you could say that we had a close professional relationship and within, I don't know, a couple months it became a personal relationship.

DC: And when you retired in May of 1999, Mr. Altenburg presided over your retirement ceremony?

PO: Right, at the JAG school.

DC: And he was also the primary speaker at a roast in your honor that evening?

PO: Yes.

DC: And, in fact, when Mr. Altenburg retired in the summer of 2001 you were the primary speaker at his roast?

PO: No, there were three speakers. I was the only one who was retired and could say bad things about him.

DC: And you also attended his son's wedding in sometime in the fall of 2002?

PO: In Orlando, yeah.

DC: And you also contacted Mr. Altenburg when you learned that he became the appointing authority for these commissions?

PO: Right, I did.

DC: And you are aware that there were other candidates for the position of presiding officer?

PO: Yeah, uh-huh.

DC: Thirty-three others, in fact?

PO: Okay. No. What I know about the selection process I wrote. I don't know who else was considered and who else was nominated. Knowing the Department of Defense I imagine that all four services sent in -- excuse me, that there were lots of nominations and they went somewhere and they got to Mr. Altenburg somehow. I don't know how many other people were nominated.

DC: So the ultimate question is how would you answer the concerns of a reasonable person who might say based on this close relationship with Mr. Altenburg that there is an appearance of a bias, or impartiality -- or partiality rather and that you were chosen not because of independence or qualifications, but rather because of your close relationship with Mr. Altenburg, and how would you answer that concern?

PO: Well, *I would say first of all that a person who were to examine my record as a military judge -- and all of it is open source. All of my cases are up on file at the Judge Advocate General's office in DC -- could see at the time when I was the judge at Bragg, sitting as a judge alone, acquitted about six or seven of the people he referred to a court-martial. They could look at the record of trial and see that in several cases I reversed his personal rulings. They could look at my record as a judge and see that I really don't care who the SJA was in how I acted. So a reasonable person who took the time to examine my record would say, no, it doesn't matter.*

....

P: *Sir, do you care what Mr. Altenburg thinks about any ruling or decision you might make?*

PO: No. You want to ask what I think Mr. Altenburg wants from me?

P: Do you know, sir?

PO: No, I asked would you like to ask me what I think he wants?

P: Yes, sir.

PO: Okay. *I think John Altenburg, based on the time that I have known him, wants me to provide a full and fair trial of these people. That's what he wants. And I base that on really four years of close observation of him and my knowledge of him. That's what I think he wants.*

P: Do you think there would be any repercussions for you if he disagreed with a ruling of yours or a vote of yours?

PO: You all went to law school; right?

P: Yes, sir.

PO: Remember that first semester of law school and everyone is really scared?

P: Yes, sir.

PO: Well, I went on the funded program and all the people around me were really scared, but I said to myself, hey the worst that can happen is I can go back to being an infantry officer, which I really liked. Well the worse thing that can happen here, from you all's viewpoint, if you think about that, is I go back to sitting on the beach. *I don't have a professional career. Mr. Altenburg is not going to hurt me.* Okay.

P: Yes, sir. Nothing further, sir.

There is no factual basis in either record to support granting a challenge against the Presiding Officer on this ground. The records establish no actual bias by the Presiding Officer as a result of his former, routine, social and professional relationships with the Appointing Authority, nor do the parties advocate any such actual bias. Even on an implied bias basis, no well-informed member of the public who understands the traditional social relationships among military officers and the criminal prohibitions against the Appointing Authority attempting to influence the Presiding Officer's actions would have any reasonable or significant doubt that this Presiding Officer's fairness or impartiality will be affected by his prior social contacts with the Appointing Authority.

Such a finding is consistent with federal cases reflecting that the mere fact that a judge is a friend, or even a close friend, of a lawyer involved in the litigation does not, by that fact alone, require disqualification of the judge. *See, e.g., Bailey v. Broder*, No. 94 Civ. 2394 (S.D.N.Y. Feb. 20, 1997) (holding that a showing of a friendship between a judge and a party appearing before him, without a factual allegation of bias or prejudice, is insufficient to warrant recusal); *In re Cooke*, 160 B.R. 701, 706-08 (Bankr. D. Conn. 1993) (stating that a "judge's friendship with counsel appearing before him or her does not alone mandate disqualification."); *United States v. Kehlbeck*, 766 F. Supp. 707, 712 (S.D. Ind. 1990) (stating "judges may have friends without having to recuse themselves from every case in which a friend appears as counsel, party, or witness."); *United States v. Murphy*, 768 F. 2d 1518, 1537 (7th Cir. 1985, cert. denied, 475 U.S. 1012 (1986) ("In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable."); *In re United States*, 666 F.2d 690 (1st Cir. 1981) (holding that recusal was not required in extortion trial of former democratic state senator whose committee, fifteen years ago, had investigated former republican governor when the judge had been chief legal counsel for the governor); and *Parrish v. Board of Commissioners*, 524 F.2d 98 (5th Cir. 1975) (en banc) (holding that recusal was not required in class action case where judge was friends with some of the defendants and where judge stated his friendship would not affect his handling of the case).

Predisposition on Speedy Trial Motion

The fourth basis for challenge is that the Presiding Officer has formed an opinion, which he expressed at a July 15, 2004, meeting with counsel, that an accused has no right to a speedy trial in a military commission. Below are the pertinent portions of the voir dire in *Hamdan* on this issue (emphasis added).

DC: During that meeting on 15 July, did you express an opinion regarding speedy -- the right of any detainee to a speedy trial?

PO: No, I didn't.

DC: I wasn't at the meeting, but I was told that you did. I don't --

PO: Thank you.

DC: Did you mention speedy trial at all?

PO: Speedy trial was mentioned. Article 10 was mentioned, and there was some general conversation. I didn't take notes at the meeting. It was a meeting to tell people who I was and asking them to get -- start on motions and things.

DC: But you didn't expect -- while those things were mentioned, you don't recall expressing an opinion yourself?

PO: No. I didn't have any motions or anything.

....

P: Sir, the issue of speedy trial was brought up and we have, in fact, have notice of motions provided concerning speedy trial. Is there anything as you sit here right now which will impact your ability to fairly decide those motions?

PO: No.

The following exchange occurred in the *Hamdan* commission after all voir dire had been completed and challenges made and the Presiding Officer was about to recess the commission until the Appointing Authority made a decision on the challenges:

DC: Yes, sir. It came to my attention after the voir dire that there was a tape made regarding the 15 July meeting between yourself and counsel. I'd like permission to send that tape along with the other matters that I'm submitting on your voir dire regarding your qualifications.

PO: And why would you like that?

DC: To go toward the idea of whether you have an opinion or not, sir.

PO: On the questions of?

DC: Speedy trial, sir.

PO: Okay. And the tape goes to show what?

DC: Your opinion at the time, sir. I have not yet transcribed it. If it doesn't show anything -- I am proceeding here based on what I've been told by other counsel.

PO: Okay. I would be -- let me think about this. Okay, let me think about this. I am reopening the voir dire of me. Explain to me -- ask me what you want about what I said or may have said on the 15th.

DC: Yes, sir. It's my understanding, sir, that on the 15th you expressed an opinion as to whether the accused have -- whether any detainee had a right to a speedy trial.

PO: Do you think that's correct or do you think that's in reference to Article 10?

DC: My understanding from counsel was that it referenced whether they would have a right to a speedy trial under Article 10 or rights, generally. I confess, sir, I have not heard the tape.

PO: Okay. Why don't you ask me if I am predisposed on that.

DC: Are you predisposed towards those issues, sir?

PO: I believe in the meeting -- I don't remember speedy trial, I remember Article 10 being mentioned, and I believe I said something to the effect of, Article 10, how does that come into play, or words to that effect. I did not know that my words were being taped, and I must confess that when I walked into the room that day I had no idea that Article 10 would come into play because I hadn't had an occasion to review Article 10. It is not something that usually comes up in military justice prudence -- jurisprudence. *So I'm telling you right now that I don't have a predisposition towards speedy trial.* However, although the tape was made without my permission, without the permission of anyone in the room, I do give you permission to send it to the appointing authority with the other matters.

DC: Sir, what I would like to ask, if I transcribe it, that I send it to you first.

PO: I don't want to see it.

DC: Yes, sir.

PO: Okay. Well, wait a second. Do you want to change -- do you want to add on anything to your challenge or stick with it?

DC: No, sir.

PO: How about you?

P: No objection to the tape being sent, sir.

Neither defense counsel nor the prosecution in the *Hicks* case asked any questions of the Presiding Officer concerning a possible predisposition on speedy trial.

In support of this challenge, Hamdan's defense counsel provided an edited transcript of the pertinent portions of the tape recording⁸ of the July 15, 2004, meeting, which provides in part:

PO: Hicks has been referred to trial, right. There's no procedure that I've seen that requires an arraignment, has anyone seen anything like that? It requires [Hicks] be informed of the nature of the charges in front of the commission. Okay, uh, there's no such thing as a speedy trial clock in this thing. Right, has anybody seen a speedy trial? Chief Prosecutor: Sir, I wouldn't even be commenting on that in light of the fact that I think [named defense counsel] believe Article 10 [UCMJ] applies to these proceedings so we ought to stay away from that issue.

DC (al Qosi): I don't think it is appropriate either sir.

Chief Prosecutor: We need to stay away from that.

DC (al Qosi): These are the subjects of motions that are going to be filed and your comments--

PO: I'm asking a question and you can all voir dire me on that, but how are we going to try Mr. Hicks?

⁸ Counsel are reminded that audio recording of Commission proceedings is prohibited unless authorized by the Presiding Officer and that compliance with the Military Commission Orders and Instructions is a professional responsibility obligation for the practice of law within the Department of Defense. See MCO No. 1 at Section 6B(3); MCI No. 1 at paragraphs 4B,C.

Neither defense team cited any case law from any jurisdiction to support their argument that these facts warrant removal of the Presiding Officer. Generally speaking, "[a] predisposition acquired by a judge during the course of the proceedings will only constitute impermissible bias when 'it is so extreme as to display clear inability to render fair judgment.'" *United States v. Howard*, 218 F.3d 556, 566 (6th Cir. 2000) (quoting *United States v. Liteky*, 510 U.S. 540, 551 (1994)). Furthermore, "the mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice." *United States v. Bray*, 546 F.2d 851, 857 (10th Cir., 1976) (citing *Antonello v. Wunsch*, 500 F.2d 1260 (10th Cir. 1974)).

The transcripts reveal that on occasion, as in this instance, the Presiding Officer was too casual with his remarks. Some of the detainees at Guantanamo have been there for almost three years. Understandably, they and their attorneys recognize that the determination of what, if any, speedy trial rules apply to military commissions is an important preliminary matter that must be resolved by the members of the military commissions after considering evidence and arguments presented by the parties.

Although not artfully done, the Presiding Officer was trying to tell counsel at the July 15, 2004, meeting that there are gaps in the commission trial procedures that he and counsel will have to address. Prior to the Presiding Officer's comments about arraignment and speedy trial, counsel were advised that the Presiding Officer would be issuing written guidance addressing how to handle some of the gaps in the commission procedures. As the Presiding Officer stated at that meeting, there are no published commission procedures concerning the subjects of arraignment or speedy trial. He was using arraignment and speedy trial as examples of traditional military procedures that were not mentioned in military commission orders or instructions, and that he and the parties would have to address. In fact, just four days after this meeting, the Presiding Officer issued the first three memoranda in a series of Presiding Officer Memoranda, in the nature of rules of court, to address issues not fully covered by military commission orders or instructions.⁹ There are currently ten Presiding Officer Memoranda addressing topics such as motions practice, judicial notice, access to evidence and notice provisions, trial exhibits, obtaining protective orders and requests for limited disclosure, witness requests, requests to depose a witness, alternatives to live witnesses, and spectators to military commissions.

During voir dire, the Presiding Officer expressly stated that he had formed no predisposition concerning how he would rule on speedy trial motions. Considering all of the above, the record fails to establish that the Presiding Officer's spontaneous remarks in an informal meeting demonstrates a clear inability to render a fair and impartial ruling on speedy trial motions or otherwise disqualifies him from performing duties as a Presiding Officer.

⁹ Current versions of all Presiding Officer Memoranda may be found on the Military Commission web site, available at <http://www.defenselink.mil/news/commissions.html>.

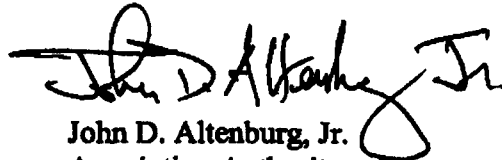
DECISION

The challenges for cause against the Presiding Officer and COL S are denied. Effective immediately, the challenges for cause against COL B (the Marine), LTC T, and LTC C are granted and each of these members is hereby permanently excused from all future proceedings for all military commissions. The country is grateful for the professional, dedicated, and selfless service of these exceptional officers in this sensitive and important matter.

A military commission composed of the Presiding Officer, COL S, and COL B (the Air Force officer) will proceed, at the call of the Presiding Officer, in the cases of *United States v. Hamdan* and *United States v. Hicks*. No additional members or alternate members will be appointed. See MCO No. 1 at Section 4A(1) and MCI No. 8 at paragraph 3A(1).

Official orders appointing replacement commission members for the cases of *United States v. al Qosi* and *United States v. al Bahlul* will be issued at a future date. See MCO No. 1 at Section 4A(1) and MCI No. 8 at paragraph 3A(1).

There is no classified annex to this decision.



John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

FLETC

Federal Law Enforcement Training Center

About FLETC

The FLETC serves as an interagency law enforcement training organization for 81 Federal agencies (aka Partner Organizations). The Center also provides services to state, local, and international law enforcement agencies (Click here for a more thorough overview of FLETC training; click here to read our Mission Statement).

The Center is headquartered at Glynco, Ga., near the port city of Brunswick, halfway between Savannah, Ga., and Jacksonville, Fla. In addition to Glynco, the FLETC operates two other residential training sites in Artesia, N.M., and Charleston, S.C. The FLETC also operates an in-service re-qualification training facility in Cheltenham, Md., for use by agencies with large concentrations of personnel in the Washington, D.C., area. The FLETC has oversight and program management responsibility for the International Law Enforcement Academy (ILEA) in Gaborone, Botswana, and supports training at other ILEAs in Hungary and Thailand.

Export training and technology-based distributed learning are increasingly important methods of training delivery. These methods are used when the programs being taught do not require specialized facilities and/or when a geographical concentration of personnel can be identified. Additionally, the FLETC seeks and develops alternative training technologies, especially simulation and modeling to augment existing training delivery systems and methodologies.

Many of the FLETC's 81 Partner Organizations have transferred portions or all of their law enforcement training operations to one of the FLETC's permanent sites to coordinate the activities of their personnel and to conduct advanced and agency-specific programs.

Consolidation of law enforcement training permits the Federal Government to emphasize training excellence and cost-effectiveness. Professional instruction and practical application provide students with the skills and knowledge to meet the demanding challenges of a Federal law enforcement career. They learn not only the responsibilities of a law enforcement officer, but through interaction with students from many other agencies, they also become acquainted with the missions and duties of their colleagues. This interaction provides the foundation for a more cooperative Federal law enforcement effort.

The Center's parent agency, the Department of Homeland Security (DHS), supervises its administrative and financial activities. The FLETC Director serves under the authority of the Under Secretary for Border and Transportation Security. The Director is assisted with operational oversight and execution in the management of the Center by an executive team with unmatched breadth and depth of experience in training and administration.

Also, as an interagency training organization, the FLETC has assembled the finest professionals from diverse backgrounds to serve on its faculty and staff. Approximately one-third of the instructor staff are permanent FLETC employees. The remainder are Federal officers and investigators on short-term assignment from their parent organizations or recently retired from the field. This mix of permanent, detailed, and recently retired staff provides a balance of experience and fresh insight from the field.

Partner Organizations have input regarding training issues and functional aspects of the Center. Agencies take part in curriculum review and development conferences and help develop policies and directives. This relationship is characteristic of a "true partnership," responsive to the training mission.

Since its inception in 1970 (click here for more [History](#)), the FLETC has invested heavily in renovation, expansion, acquisition, and new construction to meet the ever increasing training needs of its Partner Organizations. This effort gained considerable momentum following a series of Congressional mandates in the 1990's. Impetus was again added following the terrorist attacks of Sept. 11, 2001.

Flagship basic training programs:

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- Natural Resources Police Training Program – for land management agencies

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**Homeland
Security**

FLETC Partner Organizations

Agency for International Development
Office of the Inspector General

Department of Agriculture
* U.S. Forest Service Office of the Inspector General

Central Intelligence Agency
Office of the Inspector General Office of Security

Department of Commerce
Bureau of Industry and Security
* National Marine Fisheries Service
National Institute of Standards and Technology
Office of the Inspector General
Office of Security

Department of Defense
* Air Force Office of Special Investigations
* Defense Criminal Investigative Service
Defense Logistics Agency
National Security Agency
* Naval Criminal Investigative Service
Office of the Inspector General
Pentagon Force Protection Agency

Department of Education
Office of the Inspector General

Department of Energy
Office of the Inspector General

* **Environmental Protection Agency**
Criminal Investigations Division
Office of the Inspector General

Federal Deposit Insurance Corporation
Office of the Inspector General

General Services Administration
Office of the Inspector General

Department of Health and Human Services
Food and Drug Administration
National Institutes of Health
Office of the Inspector General

Department of Homeland Security
* Border Patrol
* Citizenship and Immigration Services
* U.S. Coast Guard
* Customs and Border Protection
* Federal Air Marshals
Federal Emergency Management Agency Office of the Inspector General
Federal Emergency Management Agency Office of Safety and Security
* Federal Protective Service
* Immigration and Customs Enforcement
Office of the Inspector General
* U.S. Secret Service
* Transportation Security Administration

Department of Housing and Urban Development
Office of the Inspector General

Department of the Interior
* Bureau of Indian Affairs
Bureau of Land Management
Bureau of Reclamation
* U.S. Fish and Wildlife Service
* National Park Service
Office of the Inspector General
Office of Surface Mining Reclamation and Enforcement
* U.S. Park Police

* **Department of Justice**
* Bureau of Alcohol, Tobacco, Firearms and Explosives
Federal Bureau of Investigation Police
* Federal Bureau of Prisons
* U.S. Marshals Service
Office of the Inspector General

Department of Labor

Office of the Inspector General

National Aeronautics and Space Administration
Office of the Inspector General

National Railroad Passenger Corporation
Amtrak Police

Nuclear Regulatory Commission
Office of the Inspector General

Office of Personnel Management
Office of the Inspector General

U.S. Postal Service
Office of the Inspector General
U.S. Postal Inspection Service-Postal Police

Railroad Retirement Board
Office of the Inspector General

Small Business Administration
Office of the Inspector General

Smithsonian Institution
National Zoological Park Police
Office of Protection Services

Social Security Administration
Office of the Inspector General

Department of State
*** Diplomatic Security Service**
Office of the Inspector General

Tennessee Valley Authority
Office of the Inspector General
TVA Police

Department of Transportation
Office of the Inspector General

Department of the Treasury
Bureau of Engraving and Printing
Financial Crimes Enforcement Network
*** Internal Revenue Service Criminal Investigations Division**

Office of the Inspector General
* Treasury Inspector General for Tax Administration
U.S. Mint Police

U.S. Congress
* U.S. Capitol Police
Library of Congress Police
Office of the Inspector General
Office of Security

U.S. Courts
Office of Probation and Pretrial Services
Supreme Court Police

Department of Veterans Affairs
Office of the Inspector General

Summary:

3 Branches of Government
31 Member Departments and Independent Agencies
82 Partner Organizations

* Indicates agencies with on-site offices or academies at Glymco, Artesia, Charleston, or Cheltenham.

**SIXTH ANNUAL LEADERSHIP CONFERENCE
JUNE 13-17, 2005
RANCHO MIRAGE, CA
AGENDA**

Monday, June 13, 2005

7:30 a.m. - 1:00 p.m.	Golf – Best Ball Game
12:00 noon - 5:00 p.m.	Registration Opens Celebrity Foyer
4:00 p.m. - 5:00 p.m.	WIFLE Business Meeting Open to All WIFLE Members Celebrity F&G Rooms
6:00 p.m. - 7:30 p.m.	Welcome Reception in Exhibit Hall Celebrity A, B, C & D Rooms

Tuesday, June 14, 2005 – *Leadership Training Emphasizing Core Competencies*

8:00 a.m. – 9:00 a.m.	Registration – Celebrity Foyer
8:00 a.m. – 4:00 p.m.	Exhibit Hall - Celebrity A, B, C & D Rooms
9:00 a.m. - 10:00 a.m.	Opening Ceremony Celebrity E, F, G & H Rooms
	Presentation of Colors: U.S. Customs and Border Protection Honor Guard
	National Anthem: Agent Curtis Hemenway U.S. Customs and Border Protection
	Welcome: Margaret M. Moore, Executive Director, WIFLE Sheree L. Mixell, President, WIFLE
	Keynote Speaker Debra W. Yang, United States Attorney Central District of California <i>Building Partnerships & Leading Change</i>
10:00 a.m. - 10:10 a.m.	Break

Plenary Sessions:
Celebrity E, F, G & H Rooms

- 10:10 a.m. - 11:25 a.m. **Leadership Keynotes - Career Employees' Achievements**
Michele Leonhart, Deputy Administrator, Drug Enforcement Administration
Barbara Riggs, Deputy Director, U.S. Secret Service
Edgar Domenech, Deputy Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives
Strategic Planning, Flexibility and Resilience
- 11:25 a.m. – 11:30 a.m. Break
- 11:30 a.m. – 12:15 p.m. **Leadership and Performance**
Lee R. Heath, Chief, U.S. Postal Inspection Service
- 12:15 p.m. - 1:30 p.m. Boxed Lunch
- 1:30 p.m. - 3:00 p.m. **Leadership Workshops – choose two of four**

A. FBI Panel of Women – PENTTBOM Investigation: Counterterrorism, the Changes, the Challenges

Amy Jo Lyons, Special Agent in Charge, Federal Bureau of Investigation
Mary Galligan, Supervisory Special Agent, Federal Bureau of Investigation
Joan Marie Turchiano, Supervisory Special Agent, Federal Bureau of Investigation
Leading Change

B. Women, Violence and the Media

Wendy Murphy, CBS Legal Analyst
Communication and External Awareness

C. Recruiting Women in Federal Law Enforcement

“IRS Recruiting Efforts”
Dan Orzechowski, Recruiter/Appeals Officer, Internal Revenue Service
“Why the FBI Needs More Women Agents”
James Knights, Special Agent, Federal Bureau of Investigation
Innovation

D. The First Federal Women in Charge (A Research Report on 50 Federal Women)

Dr. Dorothy Schulz, John Jay College of Criminal Justice
Adaptability

- 3:00 p.m. - 3:30 p.m. BREAK
- 3:30 p.m. - 5:00 p.m. Repeat Workshops A, B, C, D

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Wednesday, June 15, 2005, *Leadership Training Emphasizing Core Competencies*

8:00 a.m. – 4:00 p.m. Exhibit Hall - Celebrity A, B, C & D Rooms

Plenary Sessions:
Celebrity E, F, G & H Rooms

9:00 a.m. – 10:45 a.m. **Emerging Lessons from al Qa'aida and the Arab Terrorist Mindset, and Guantanamo Case Study**
Lea Bauer, Special Agent, U.S. Secret Service
Dr. R. Scott Shumate, Psy.D., Counterintelligence Field Activity
Department of Defense
Mark E. Smithberger, Black Hawk Systems
Dr. Susan A. Keverline, Ph.D., Research Psychologist, U.S. Secret Service
Problem Solving, Strategic Thinking and Leveraging Diversity

10:45 a.m. - 11:00 a.m. BREAK

11:00 a.m. – 11:45 a.m. **The Patriot Act**
Mary Beth Buchanan, United States Attorney
Western District of Pennsylvania
Continual Learning, Honesty/Integrity

11:45 a.m. – 12:30 p.m. **Opening and Securing the Embassy at Kabul, Afghanistan**
Justine Sincavage, Special Agent, U.S. Department of State
Diplomatic Security Service
Decision Making, Negotiating, Interpersonal Skills

12:30 p.m. - 1:30 p.m. Boxed Lunch

Leadership Workshops - *Results Driven, Building Business Acumen*

Track A - Using Technology During Your Investigations - *Planning and Organizing Work*

1:30 p.m. - 2:30 p.m. **The Use of Deception in Law Enforcement Operations, and Privacy and Video Surveillance**
Jeffrey Fluck, Legal Instructor, Federal Law Enforcement Training Center

2:30 p.m. - 3:30 p.m. **The Law of Installing and Monitoring Tracking Devices, Handling Digital Photographs For Use in Criminal Trials**
Keith Hodges, Legal Instructor, Federal Law Enforcement Training Center

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3:30 p.m. - 4:00 p.m.

Break

4:00 p.m. - 5:00 p.m.

Case Organization and Presentation Training Program
Judi Langford, Senior Instructor, Federal Law Enforcement
Training Center

Track B - Investigators Collaborate - *Developing a Successful Team, Entrepreneurship and Partnering*

1:30 p.m. - 2:30 p.m.

Public/Private Partners Coalition
Linda J. Reid, Marine Security Analyst, Princess Cruises and
Cunard Line
Inés DeRomana, Senior Policy Coordinator, UC Education Abroad
Program
Mary Hackman, U.S Department of State, Diplomatic Security
Service

2:30 p.m. - 3:30 p.m.

Target Corporation - Making Communities Safer
Judy Braunstein, Investigations Team Leader
Lora Setter, Regional Investigation Team Leader

3:30 p.m. - 4:00 p.m.

Break

4:00 p.m. - 5:00 p.m.

Ecstasy International Drug Trafficking
Jean Morhbacher, Assistant United States Attorney, Central
District of California
Mary Cooper, Special Agent, Drug Enforcement Administration
Deanne Reuter, Special Agent, Drug Enforcement Administration
Elizabeth W. Kempshall, Special Agent, Drug Enforcement
Administration

Track C - Investigating Terrorism - *Technical Credibility, Problem Solving and Innovation*

1:30 p.m. - 2:30 p.m.

Bioterrorism Investigations
Janet Stout, Postal Inspector, U.S. Postal Inspection Service

2:30 p.m. - 3:30 p.m.

Terrorism Financing
Rebecca Sparkman, Executive Assistant to the Chief, Internal
Revenue Service, Criminal Investigation

3:30 p.m. - 4:00 p.m.

Break

4:00 p.m. - 5:00 p.m.

Conducting Operations in a War Zone
Major S. Kristine Burnett, Chief, Security,
Counterintelligence, and Special Programs, Office of the
Secretary of the Air Force

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Jeanmarie V. Sentell, Special Agent,
Naval Criminal Investigative Service
Nicole Gallagher, Special Agent, Diplomat Security Service

6:00 p.m. – 7:00 p.m.

Award Reception
for Awardees, Agency Heads, and Invited Guests
NEXTEL – Sponsor

7:00 p.m. – 9:00 p.m.

Awards Banquet – Ambassador Ballroom

Presentation of Colors:
U.S. Secret Service/Uniformed Division Honor Guard

Keynote Speaker:
Carl J. Truscott, Director
Bureau of Alcohol, Tobacco, Firearms, and Explosives

Special Presentation of the Julie Y. Cross Award by
Barbara Riggs, Deputy Director, U.S. Secret Service

Thursday, June 16, 2005

You and Your Federal Career Day

Plenary Sessions:
Celebrity E, F, G & H Rooms

9:00 a.m. - 9:50 a.m.

Keynote Speaker
Innovations in Leadership - Creating a Culture to Excel
Nancy J. Jardini, Chief, Internal Revenue Service, Criminal
Investigation

9:50 a.m. - 10:00 a.m.

Break

10:00 a.m. - 10:50 a.m.

Defining the Approach to Law Enforcement Training
Connie L. Patrick, Director
Federal Law Enforcement Training Center

10:50 a.m. - 11:00 a.m.

Break

11:00 a.m. - 12:15 p.m.

**Julie Y. Cross Panel – Heroism – A Personal Account from
Past Award Recipients**
Jenna Maguire, Special Agent, Bureau of Alcohol, Tobacco,
Firearms, and Explosives
Samantha Mikeska, Special Agent, Federal Bureau of Investigation
Susan Goggin, Special Agent, U. S. Secret Service
Margarita Serna, Deputy U.S. Marshal, U.S. Marshal Service

12:15 p.m. - 1:30 p.m.

Lunch on Your Own

1:30 p.m. - 2:30 p.m.

Investing in TSP for Both FERS and CSRS Employees
Saundra K. Harman, President, S. Harman & Associates, Inc.

2:30 p.m. - 4:30 p.m.

**Department of Homeland Security – A Law Enforcement
Community for the 21st Century**
Carmen Walker, Director, EEO, Department of Homeland Security
*Open Forum on Issues Facing Women in Federal Law
Enforcement*

- Hosted by the Silicon Valley Chapter of HTCIA -



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Speaker Information

Final list of speakers and their topics as of 8/20/05

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[Harley Ride August 28th. Read more](#)
[The Hyatt Regency is SOLD OUT Read more](#)

Baum, Eric	Encryption - Best Practices for Information Protection - In Motion & at Rest	PGP
Bennett, Patrick	Electronic Surveillance Countermeasure: Bugs to Recorders	Walsingham Associates Inc.
Bird, Tina	Endpoint Configuration Management & Network Access Control	InfoExpress
Bowker, Art	Pre-Search Tools for Probation, Parole & Law Enforcement	US Probation, OH
Bowker, Art	Who is the Cyber-sex Offender?	US Probation, OH
Brill, Alan	Computer Forensics Best Practices	Kroll Ontrack
Brown, Christopher	Benefits/Techniques for Live Investigations	Technology Pathways LLC
Brown, Christopher	Introduction to ProDiscover Lab	Technology Pathways LLC
Brown, Christopher	Using Perl with ProDiscover	Technology Pathways LLC
Cannon, Richard	Locating Print Spooler Artifacts	Association of Certified Fraud Examiners
Carrier, Brian	Understanding NTFS File Recovery	CERIAS
Chappell, Laura	White Hat/Black Hat Toolbox 2005	Protocol Analysis Institute, LLC
Chamota, Ben	Mac Forensics	Black Bag Technologies
Christianson, Jennifer	Tips and Tricks for Digital Media Analysis	HTCIA Mid-Atlantic President
Christin, Jack / Rou, Mike	Ebay / Paypal Investigations A-Z	Ebay
Cohen, Tyler	Imaging Alternative Media	Computer Sciences Corp.
Cohen, Tyler	Hacking with iPods and Forensic Analysis	Computer Sciences Corp.
Dombrowski, Larry	Computer Forensics Examiner/War on Terror	Erie County DA
Door, Earl	RAIDS Seizure & Imaging	SEARCH Group, Inc.
Door, Earl	Managing a High Tech Crime Unit	SEARCH Group, Inc.
Esposito, Chris	Metasploit: The Morning After	Guidance Software
Farid	From Photons To Pixels To Photoshop	Microsoft
Farwell, William	Email Forensics - How to Prove Email Forgery Cases	RE 64 (al Qahtani)
Gervais, Glenn	Internet Issues for Parents	Deloitte Financial Advisory Services
Hansen, Jon	Networks 101: The Basics	Windsor Police, Canada
Hansen, Jon	The Microsoft Registry & Finding Registry Evidence	Access data
Hansen, Jon		Access data

Hansen, Jon	A+ / Network+ Exam Prep and Overview	Access data
Hansen, Jon	FTK Imager and the Basics of FTK	Access data
Hapsas/Cobb	Intro to Encase: Email Artifacts	Guidance Software
Hapsas/Cobb	Intermediate Encase: Internet Artifacts	Guidance Software
Hapsas/Cobb	Advanced Encase: Peer to Peer file sharing	Guidance Software
Hatchett	Forensic Video & The CSI Effect	Evidence Technology
Hausman / Seymor	How to Conduct Internet Investigations	MPA
Hedgepath, Robert	Lock Picking for Work Place Environments	H.P.
Hennanzen, Jack	Multi-cultural Names and Databases	Language Analysis Systems
Hetherington, Cynthia	Opt Out of the Internet	Hetherington Info services
Hodges, Keith	Are Your Digital Images Admissible in Court?	FLETC Instructor
Hodges, Keith	Tracking the Bad Guys - The Law of Tracking Devices	FLETC Instructor
Hoerner, Chet	Examining Live Systems in Digital Investigations	WetStone
Hoerner, Chet	Steganography Investigator Overview	WetStone
Jane Kirschner	X-Ways Forensics	X-Ways Software Technology AG
Jeger, Dan	Artifacts of Popular Data Deletion Utilities	Quest Consultants
Johnson, Larry	Financial Cyber Crime Trends	US Secret Service
Jolley, Jim	Wireless Networks and Devices for Investigators	SEARCH Group, Inc.
Jones, Harold	Instant Messaging-Cases and Investigators	Riverside, Ohio Police Department
Jones, Harold	Spyware	Tech Evidence Inc
Kessler, Gary	Intro to Stagenography	Champlain College
Kessler, Gary	TCP/IP and Network Forensics	Champlain College
Kessler, Gary	Intro to Cryptography	Champlain College
Kirchner, Mark	TCP/IP Concepts Tools & Techniques for Investigators	NYPD Computer Crimes Squad
Kruse, Warren	Password Cracking	Computer Forensic Services
La Magna	Microsoft Commitment to Internet Safety	Microsoft
Lee, Jennifer	Identifying Victims in Online Child Pornography	NCMEC
Lee, Rick	War Driving	Sasktel - Canada
Lewis, Glenn	Alternative Web Browsers	Defense Computer Investigator Training
Lockhart, Keith	Data Carving and Advanced Searches in FTK	Access data
Lockhart, Keith	FTK for the Internet	Access data
Mandis, Kevin	LINUX Boot camp Pre Conference	Red Cliff
McFadden, Matt	Cyber-ID Theft	Clovis Police Department
McFadden, Matt	Cyber-ID Theft	Clovis Police Department
Menz, Mark	Tips & Tricks 2005	Independent Consultant
Menz, Michael	Physically Locating IP Addresses on the Internet	H.P.
Menz, Michael	E-Discovery: Tips & Tricks	H.P.
Montgomery/Studhalter	Microsoft Anti-Piracy	Microsoft
Montassey, Patrick	The National Cyber Security Division Overview w/emphasis on Law Enforcement & Intelligence Subdivision	National Cyber Security Division from the Secret Service
Norton, Bill	Digital Imaging and Forensics	Ohio Peace Officers Academy
O'Leary, Bob	Electronic Crime Prevention & Investigations	Electronic Crime Partnership Initiative
Painter, Chris		US DOJ
Pancoast, Scott	ILook	Nat. White Collar Crime Cntr.

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Potriska, Ives R.	First Internet Murder	Center for Computer Forensics
Quilly, Thomas	Software, Movie, Music, and Game Piracy	REACT TF
Reyes, Anthony	The Truth about Cyber-Terrorism	Technology Management Consulting
Reynolds, Dennis	Real-time Network Investigations	Guidance Software
Rosen, Andy	SMART Linux Forensics	ASR Data
Rosen, Andy	Advanced SMART Linux Forensics	ASR Data
Rude, Thomas	Intro to Linux	Independent Consultant
Rude, Thomas	What You Don't Know About Linux	Independent Consultant
Santorelli, McBride, Stein	Internet Safety & Botnets	Microsoft
Schmidt, Howard	Chief Security Strategist	US CERT Partners Pgm. for the Nat. Cyber Sec. Div.
Schmidt, Raemarie	Details of the NTFS file system	Digital Intelligence, Inc.
Schroeder, Amber	Cell Phone Seizure	Paraben
Schroeder, Amber	Email Forensics	Paraben
Schroeder, Amber	PDA Forensics	Paraben
Spruill, Andy	Intellectual Property Theft & Loss	Guidance Software
Starrett, Paul	Reconstructing Electronic Transactions	Sterrett Law
Stein, Santorelli, McBride & McBride	Microsoft Internet Safety/Legal Compliance	Microsoft
Sullivan, Mike	Identifying Online Offenders	Illinois Attorney General Office
Sullivan, Mike	Software to Protect Kids Online	Illinois Attorney General Office
Thompson, Eric	Computer Forensics in the 21st Century	Access data
Thompson, Eric	Password, Dictionary & Brute-Force Attacks w/ PRTK/DNA	Access data
Toczynski, Zach	Anti-Piracy Investigations	Entertainment Software Assoc
Trevey, Brian	Credit Card Association Requirements	AmbironTrustWave
Veldzquez, Andrés	Latin American LEO and PC Forensics	Independent Consultant
Weber, Betsy	Capturing Digital Forensic Evidence with Snagit and Camtasia Studio	TechSmith Corporation
Zembris, Thanassis	CD/DVD Replication Forensics	Intl Federation of the Photographic Ind.

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The USA Patriot Act



Keith Hodges
FLETC Legal Division

Handouts available at
www._____.com/_____



**On September 11,
2001, more
Americans were
murdered than**



**American
battle deaths in
the war of
1812.**



American battle deaths at Pearl Harbor.



Thomas E. Franklin/The Record/AP

American battle deaths in the Indian Wars (1817-1898).



**American battle
deaths in the
Mexican War
(1846-1848).**

American battle deaths in Vietnam prior to 1966.



Union battle deaths at first Manassas (Bull Run).



**Police officers
killed in the
line of duty
since 1984.**

**(72 officers
murdered on
September 11)**

(Officer Down Memorial)



- **On October 26, 2001, President Bush signed the USA Patriot Act into law.**

- **There was little debate.**
- **There were few conferences.**
- **The House vote was 357-66.**
- **The Senate vote was 98-1.**

The USA Patriot Act

(PL 107-56)

Changes in federal Law
that assist state and
local law enforcement

Patriot Act - Major Areas

- Foreign Intelligence and Terrorism.
 - Easier to track terrorists and spies.
- Money Laundering.
 - Easier to follow the money.
- Immigration Laws
 - FBI and INS working together more closely

Patriot Act - Major Areas

* What we will discuss *

- Money and resources to combat general crime.
- Broader search warrant authority.
- Weapons to track and obtain the electronic communications of criminals.

More DNA Samples

OLD: DNA samples taken for limited class of federal offenses are entered in FBI DNA database (CODIS).

NEW: Class of offenses greatly expanded and now includes any offense remotely associated with terrorism and any crime of violence.

- *USA Patriot Act Section 503*
- *Affects 18 USC Sections 42 USC Section 14125a*

Electronic Crimes Centers USSS

- By Executive Order and Patriot Act
- Critical Infrastructure Assurance
- Electronic Crimes Task Force
 - Establish a nationwide network
- SA Bob Weaver, rweaver@usss.treas.gov

Federal Cybersecurity Assistance

NEW: \$50,000,000 per year for DOJ to establish regional computer forensic laboratories to:

- ✓ Assist state and local law enforcement on computer-related crime.
- ✓ Do forensic examinations on seized or intercepted computer evidence.
- ✓ Training to state/local LEOs and prosecutors on computer-related crime.
- ✓ Sharing expertise with state and local LEOs to include multi-jurisdictional task forces.

- *USA Patriot Act Section 816*

Federal Benefits for Death/Injury

OLD: \$100k benefit to “public safety officer” death in line of duty/on duty.

NEW: Death benefit increased to \$250k.

“Total disability” benefit remains the same (\$5 million cap.)

- *USA Patriot Act Section 613*
- *Affects 42 USC Section 3796*
- *DOJ – BJA fact sheet at: <http://www.ncjrs.org/pdffiles1/bja/fs000271.pdf>*

Broader search warrant authority

Sneak and Peek Warrants

(Covert entry warrants)

OLD: Question whether and when notice required.

NEW: May enter without notice to look for – but not seize – evidence.

- Notice of search may be delayed if “reasonable cause” the notice may have adverse result.
- No-knock OK.
 - *USA Patriot Act Section 213*
 - *18 USC Section 3103a*

Domestic Terrorism Warrants

NEW: Nationwide warrants for “domestic terrorism” by Federal judge in any district in which *activities related to the terrorism may have occurred.*

- ✓ Domestic terrorism includes any acts dangerous to human life in violation of state or federal law that appear to be intended to:
 - ✓ Intimidate or coerce population.
 - ✓ Influence government policy by coercion or intimidation
 - ✓ Affect the conduct of government by mass destruction, assassinations, or kidnapping.
- *USA Patriot Act Section 219, 802*
- *Affects 18 USC Section 2516(a)(c)*



Criminals use the Internet.

A quick primer.

Criminals Use the Internet and Electronic Communications Because

- Cheap
- Fast
- One transmission – many recipients
 - Email or web page.
- Easy to move money
- Easy to store and transmit data
- Can connect from or to anywhere
- Avoid jurisdiction and venue

How the Internet is used

- IP address –The ticket to ride the Internet.
 - IPs cost money.
 - Most IPs owned by an entity and then assigned or loaned (Earthlink, AOL, employers)
- ISP – Internet Service Provider
 - They own the IP addresses.
 - They charge money.
 - They know who their customers are (so they can bill them)

What About Free Email Addresses?

- Anyone can get a free email address
 - Yahoo, Hotmail, etc. doesn't care who you are.
 - They just want to sell stuff.
- But, to use the email address, must have an IP address.
 - We can discover their IP address.
 - And then we get leads as to identity and location.

Joe and Susie Criminal

- JoeCriminal108@hotmail.com
 - He lied about his identity
- SusieCriminal@hotmail.com
 - She lied about her identity
- Joe and Susie send emails
- Who are Joe and Susie?
- Where are they?

Susie Sends Joe an Email

From : "Susie Criminal" <susiecriminal@hotmail.com>

To : joecriminal108@hotmail.com

Subject : Are you ready?

Date : Tue, 20 Aug 2002 15:40:20 +0000

MIME-Version: 1.0

X-Originating-IP: [199.196.144.12]

Received: from 199.196.144.12 by pv1fd.pav1.hotmail.msn.com with HTTP; Tue, 20 Aug 2002 15:40:20 GMT

[Reply](#)

[Reply All](#)

[Forward](#)

[Delete](#)

[Put in Folder...](#)

[Printer Friendly Version](#)

I am ready to hit the place tomorrow. Are you ready to go?

S

We Get Susie's ISP

Trying whois -h whois.arin.net 199.196.144.12

Executive Office of Asset Forfeiture (NETBLK-EOAF-CATS)

7598 Colshire Drive
McLean, VA 20102
US

Netname: EOAF-CATS

Netblock: 199.196.128.0 - 199.196.159.255

Coordinator:

Harry, Hixon (HH348-ARIN) Harry.Hixon@do.treas.gov
703-747-9066

Domain System inverse mapping provided by:

NS1.TREAS.GOV 199.196.144.3

NS2.TREAS.GOV 199.196.144.4

NS.CIS.FED.GOV 209.31.248.10

NS3.IRS.GOV 209.49.118.21

Last 20 Visitors

Unique Visitors

25 Aug, Sun, 21:01:15	host-208-60-238-193.bna.bellsouth.net	MSIE 5	Windows 98
26 Aug, Mon, 05:14:22	63.162.71.65	MSIE 5	Macintosh
26 Aug, Mon, 08:16:16	lsanca2-ar36-4-63-160-043.lsanca2.dsl-verizon.net	MSIE 6	Windows 2000
26 Aug, Mon, 13:21:58	lsanca2-ar36-4-63-160-043.lsanca2.dsl-verizon.net	MSIE 6	Windows 2000
26 Aug, Mon, 14:48:57	WCS2-SCOTT.NIPR.MIL	Netscape 3	Other
26 Aug, Mon, 16:09:32	lsanca2-ar36-4-63-160-043.lsanca2.dsl-verizon.net	MSIE 6	Windows 2000
26 Aug, Mon, 21:04:16	ool-4351c60f.dyn.optonline.net	MSIE 6	Windows XP
27 Aug, Tue, 07:30:09	lsanca2-ar36-4-63-160-043.lsanca2.dsl-verizon.net	MSIE 6	Windows 2000
27 Aug, Tue, 18:03:19	dsc04.dai-tx-1-157.rasserver.net	MSIE 5	Windows 98
27 Aug, Tue, 18:30:56	px2cv.gv.shawcable.net	MSIE 6	Windows 98
28 Aug, Wed, 01:38:10	squid2.completel.fr	MSIE 5	Windows 2000
28 Aug, Wed, 06:53:42	lsanca2-ar36-4-63-160-043.lsanca2.dsl-verizon.net	MSIE 6	Windows 2000
28 Aug, Wed, 10:52:16	host112102.hisd.org	MSIE 5	Windows 98
28 Aug, Wed, 15:59:44	65.203.121.194	MSIE 5	Windows 2000
28 Aug, Wed, 16:33:33	dup-148-233-200-245.prodigy.net.mx	MSIE 5	Windows 98
28 Aug, Wed, 16:46:54	host-82-91-220-24.midco.net	MSIE 6	Windows XP
28 Aug, Wed, 17:07:05	webcacheM06b.cache.pol.co.uk	MSIE 6	Windows XP
29 Aug, Thu, 08:47:23	lsanca2-ar36-4-63-160-043.lsanca2.dsl-verizon.net	MSIE 6	Windows 98
29 Aug, Thu, 13:51:24	62.31.64.2	MSIE 5	Windows 98
29 Aug, Thu, 15:02:38	12-227-13-87.client.attbi.com	MSIE 6	Windows XP

Knowing the IP Leads to

- Who the IP was loaned or rented to.
- When the IP was used.
- How the person connected to the ISP and maybe from where.
 - Phone records for dial-up connections.
 - Other methods of connection.
- How the person paid the ISP (Credit Cards !)
- When they used the IP.
- Web sites visited.
- Email addresses of correspondents.

Patriot Act Tools to catch Internet and Email Users

Easier to Identify Internet Users

OLD: Court order required to obtain some information to identify Internet users.

NEW: Subpoena will get user's method of payment (to include credit card numbers), IPs, and Internet "toll records" (session times and duration)

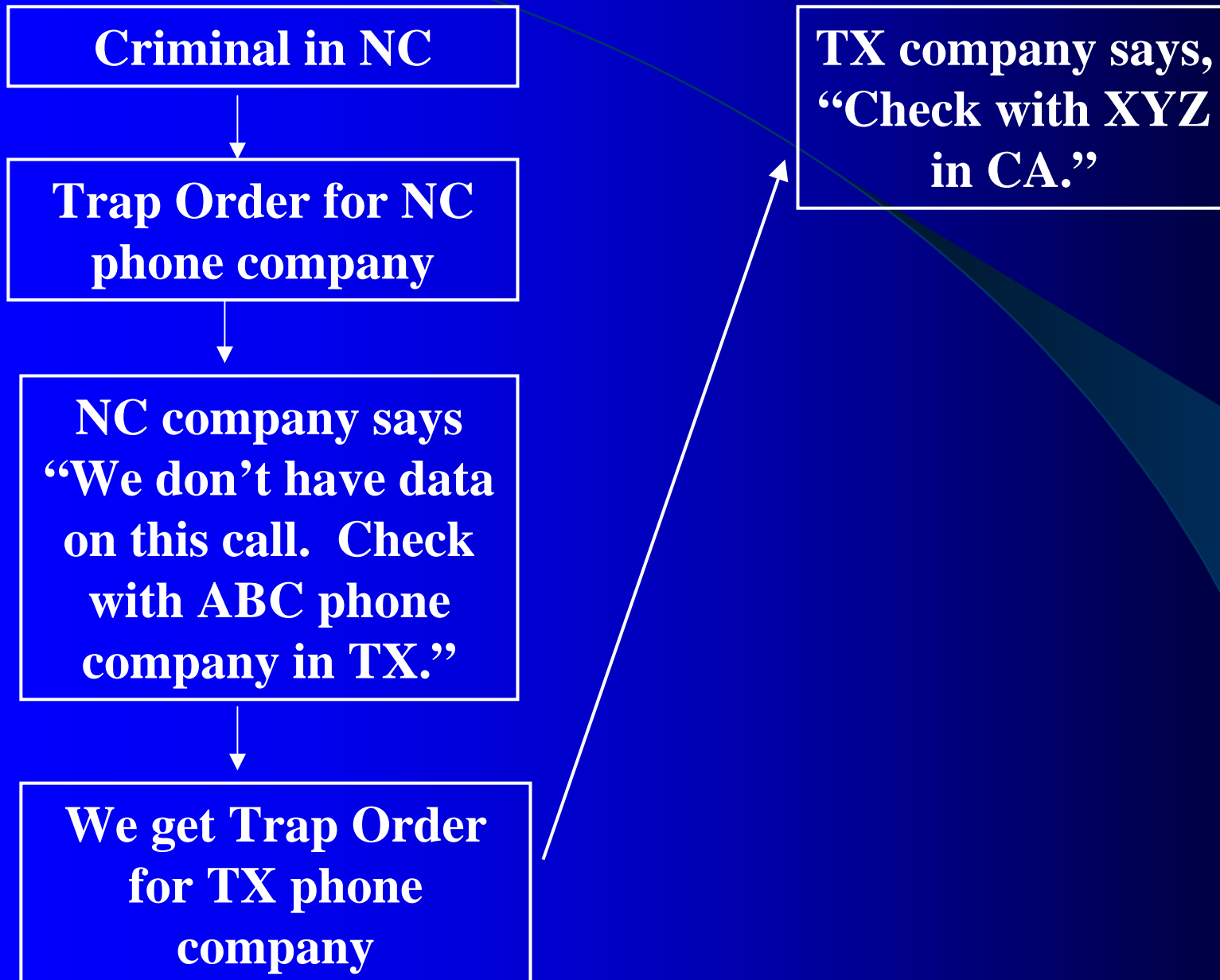
- *USA Patriot Act Section 210*
- *Affects 18 USC Section 2703(d)*

Pens and Traps on Internet Use

OLD: Pen and Trap statute focused on telephones.

NEW: Can now track Internet and cell phone use – cell phone ESNs, IP addresses, email addresses, TO and FROM in emails. (But not content).

- *USA Patriot Act Section 216*
- *Affects 18 USC Sections 3121 et. Seq.*



Nationwide Pen/Trap Orders

OLD: Needed Pen/Trap for each jurisdiction where the communication was routed.

NEW: Single nationwide Pen/Trap when issued by Federal judge with jurisdiction *over crime under investigation*.

(State Trap limited to court's jurisdiction.)

- *USA Patriot Act Section 216*
- *Affects 18 USC Sections 3121 et. Seq.*

Nationwide Pen/Traps

More good news

Names of specific providers don't have to be known when Pen/Trap order obtained.

- * LE can later certify the names of the specific providers to whom the order applies.

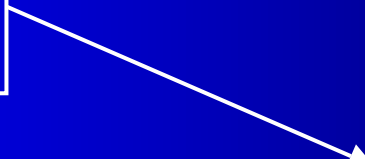
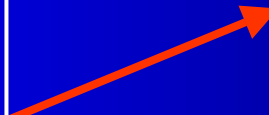
Criminal in NC



**Trap Order for NC
phone company**



**NC company says
“We don’t have data
on this call. Check
with ABC phone
company in TX.”**



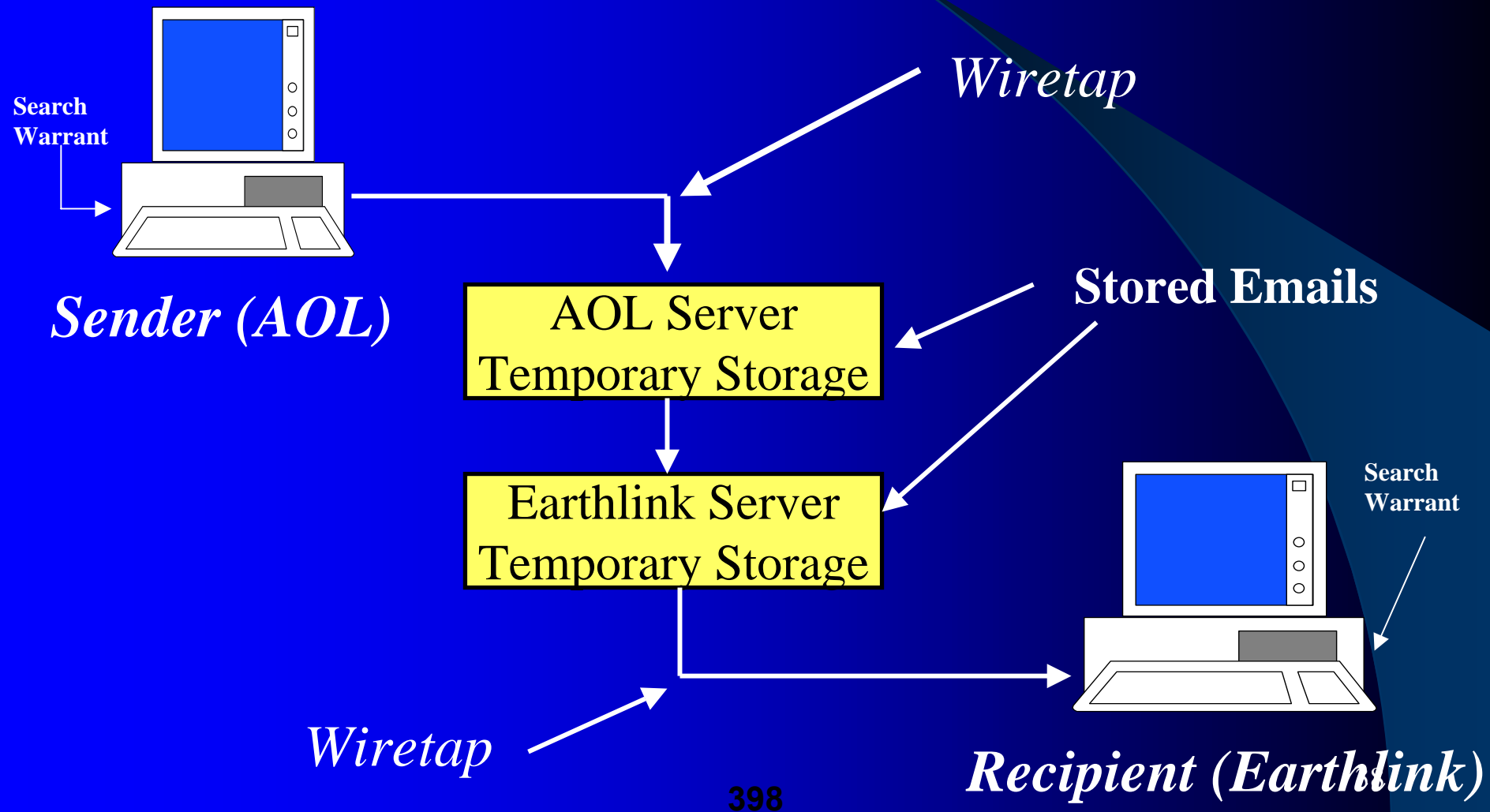
NEW

**LEO certifies the court
order applies to the TX
(and any other) company.**

OLD

**Get Trap orders in
different jurisdictions**

STORED E-MAILS



Nationwide Email Searches

OLD: Needed warrant / court order / subpoena for each jurisdiction where emails are stored.

NEW: Single nationwide warrant when issued by Federal judge with jurisdiction over crime under investigation.

- *USA Patriot Act Section 220*
- *Affects 18 USC Section 2703*

Cable Providers Can't Hide

OLD: Cable Act prevented companies from giving LE information - even if there was a warrant.

NEW: Cable companies that provide phone and Internet services treated like ISPs and phone companies.

- *USA Patriot Act Section 211*
- *Affects 18 USC Sections 2510 & 2701; 47 USC Section 551.*

Easier to Catch Hackers

OLD: Communications providers couldn't ask law enforcement to catch hackers.

NEW: Communications providers can request the assistance of law enforcement to monitor and catch hackers.

- *USA Patriot Act Section 217*
- *Affects 18 USC Section 2511*

Easier to Wiretap Hackers

OLD: Federal law did not permit wiretaps to intercept wire (human voice) communications in hacking investigations.

NEW: Feds can intercept wire communications in hacking investigations.

- *USA Patriot Act Section 202*
- *Affects 18 USC Section 2516(a)(c)*

No Wiretap for Voice Mail

OLD: A wiretap order was required for voicemail that was stored by a communications provider.

NEW: Voicemail is treated like email and can be obtained with a search warrant, court order, or subpoena.

- *USA Patriot Act Section 209*
- *Affects 18 USC Sections 2510 (1)*

Federal Crime – Charity Fraud

OLD: Telemarketing fraud did not include solicitations for fraudulent charities (though it was wire/mail fraud.)

NEW: Fraudulent phone solicitations for charities covered under telemarketing fraud – 5 year bump.
Impersonating Red Cross – max increased to 5 years.

- *USA Patriot Act Section 1011*
- *Affects 18 USC Sections 917, 2325-2327*

Handouts

www._____.com/_____



Center for Professional Responsibility

ABA Model Code

Model Code of Judicial Conduct

CANON 3²

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law*. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

- (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.
- (2) A judge shall be faithful to the law* and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.
- (3) A judge shall require* order and decorum in proceedings before the judge.
- (4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

- (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary:

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law*. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge

gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.

Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain *ex parte* communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all *ex parte* communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary:

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require* similar abstention on the part of court personnel* subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial* performance of the adjudicative duties of the office.

Commentary:

Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or

impending proceeding continues during any appellate process and until final disposition. Sections 3B(9) and (10) do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by [Rule 3.6 of the ABA Model Rules of Professional Conduct]. (Each jurisdiction should substitute an appropriate reference to its rule.)

(11) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary:

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(12) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information* acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require* staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Commentary:

Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4).

(5) A judge shall not appoint a lawyer to a position if the judge either knows that the lawyer has contributed more than [\$] within the prior [] years to the judge's election campaign,³ or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless

(a) the position is substantially uncompensated;

(b) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or

(c) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent and able to accept the position.

D. Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority*.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] should take appropriate action. A judge having knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority*.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

Commentary:

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to instances where:

Commentary:

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Commentary:

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(c) the judge knows* that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household*, has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis* interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known* by the judge to have a more than de minimis* interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge* likely to be a material witness in the proceeding;

(e) the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [] year[s] made aggregate* contributions to the judge's campaign in an amount that is greater than [[\$] for an individual or [\$] for an entity]] [[is reasonable and appropriate for an individual or an entity]].⁴

(f) the judge, while a judge or a candidate* for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to

**(i) an issue in the proceeding;
or**

(ii) the controversy in the proceeding.

Commentary:

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary* economic interests*, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary:

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

² Amended August 10, 1999, American Bar Association House of Delegates, Atlanta, Georgia, per Report 123.

³ This provision is meant to be applicable wherever judges are subject to public election; specific amount and time limitations, to be determined based on circumstances within the jurisdiction, should be inserted in the brackets.

⁴ This provision is meant to be applicable wherever judges are subject to public election. Jurisdictions that adopt specific dollar limits on contributions in section 5(C)(3) should adopt the same limits in section 3(E)(1)(e). Where specific dollar amounts determined by local circumstances are not used, the "reasonable and appropriate" language should be used.
